TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 220. 1435.

THE CENTRAL LOAN AND TRUST COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CAMPBELL COMMISSION COMPANY.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED AUGUST 2, 1897.

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(16,643.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 430.

THE CENTRAL LOAN AND TRUST COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CAMPBELL COMMISSION COMPANY.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a Be it remembered that the above and foregoing writ of error was deposited in the office of the undersigned, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, on the 24th day of June, A. D. 1897, and in pursuance to the commands contained in the said writ of error I herewith return into the Supreme Court of the United States a full, true, and complete transcript of the record in the cause entitled in said supreme court of the Territory of Oklahoma The Central Loan and Trust Company, plaintiff, against The Campbell Commission Company, defendant, being the same identical case mentioned and described in the annexed writ of error, and the transcript herewith returned is as follows, to wit:

b UNITED STATES OF AMERICA, } *ss.*:
Territory of Oklahoma, }

The President of the United States of America to the honorable judges and clerk of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma, before you, being the highest court of law or equity of the said Territory in which a decision could be had in the said suit between the Central Loan and Trust Company, a corporation, and the Campbell Commission Company, a corporation, wherein a judgment was rendered in said cause in favor of the defendant in error and against the plaintiff in error, dismissing the action of the plaintiff in error against defendant in error and discharging and dissolving the attachment which plaintiff in error had sued out against the defendant in error in said cause, and adjudging that plaintiff in error take nothing by its said action, and affirming the judgment of the lower court in favor of defendant in error at the costs of plaintiff in error, and wherein the value of the property and the amount in controversy between said parties in said cause, exclusive of costs, as shown by the affidavit of C. G. Hornor, Esq., one of the attorneys of plaintiff in error, exceeded and exceeds the sum of five thousand dollars ($5,000.00) and is of about the sum of seventeen thousand dollars ($17,000.00), a manifest error has happened, to the great damage of the said Central Loan and Trust Company, as by its complaint appears, we, being willing that error, in any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at the said Supreme Court, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to

correct that error what of right and according to the laws and customs of the United States should be done.

c Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 24 day of June, in the year of our Lord one thousand eight hundred and ninety-seven, in the year of the Independence of the United States of America the one hundred and twenty-second.

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

The foregoing writ is hereby allowed.
FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] Filed June 24, '97. Edgar W. Jones, clerk.

d UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

To the Campbell Commission Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, within 30 days from this date, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The Central Loan and Trust Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error prayed, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

I hereby accept personal service of this citation on behalf of The Campbell Commission Company, the defendant in error above named, this 24th day of June, A. D. 1897.

ASP, SHARTEL, COTTINGHAM.
Attorneys for Defendant in Error in said Cause.

e UNITED STATES OF AMERICA, } 88:
Territory of Oklahoma, }

I, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 146, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Central Loan and Trust Company, a corporation, plaintiff in error, against The Campbell Commission Company, a corporation, defendant in error, as the same remain of record and on file in said office.

Seal Supreme Court, Territory of Oklahoma.

In testimony whereof I have caused the seal of the court to be affixed at my office, in the city of Guthrie, in Logan county, Oklahoma Territory, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

f Be it remembered that on the 13th day of January, A. D. 1896, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a petition in error, with a case-made thereto attached; which said petition in error and case-made thereto attached are in words and figures following, to wit:

g In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.
} Petition in Error and Case-made.

1 In the Supreme Court of the Territory of Oklahoma.

CENTRAL LOAN & TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error.
} Petition in Error.

The Central Loan & Trust Company, plaintiff in error, complains of the said defendant in error, for that the said Campbell Commission Company, at the November term of the district court of Noble county, recovered a judgment and order dismissing an attachment, by the consideration of said court, against the said Central Loan & Trust Company in a certain action then pending in said court wherein the said Central Loan & Trust Company was plaintiff and the said Campbell Commission Company was defendant. A certi-

fied transcript of the record of said court, duly certified and attested, as well as duly authenticated case-made, is hereto attached, marked Exhibit "A," and made a part of this petition in error; and the said Central Loan & Trust Company avers that there is error in said record and proceedings in this, to wit:

First. Said court erred in considering the motion filed by defendant to the jurisdiction of the court, because the same was filed after the time specified for answer, and because the said defendant in error denied any interest in the attached property, and that said motion was insufficient in form and substance.

Second. The said court erred in sustaining said amended motion upon the second ground therein stated.

Third. Said court erred in holding that the probate judge had no power to grant the attachment on the plaintiff's demand before the same was due.

Fourth. Said court erred in holding that the Territorial Assembly of the Territory of Oklahoma had no power under the or-
2 ganic act to grant to probate judges the power to issue attachments upon debts before due upon the absence of the district judge from the county.

Fifth. The said court erred in discharging and vacating the attachment of plaintiffs levied upon the property of the defendant.

Sixth. The said court erred in dismissing said action for want of jurisdiction as to the defendant, The Campbell Commission Company.

Seventh. Said court erred in permitting the said Campbell Commission Company to file an amended plea to the jurisdiction.

Eighth. Said court erred in not holding that by the filing of the said motion by the said Campbell Commission Company it had entered its general appearance in said action and subjected itself to the jurisdiction of the district court of Noble county, Oklahoma Territory.

Wherefore the plaintiff in error prays that said judgment and order so rendered may be reversed, set aside, and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error, upon said plea, amended plea, and motion to the jurisdiction, and that the plaintiff in error be restored to all rights he has lost by the rendition of said judgment; and for such further relief as to the court may seem just.

CENTRAL LOAN & TRUST COMPANY,
Plaintiff in Error,

By HARRIS & LAFFERTY AND
KEATON & COTTERAL, *Its Attorneys.*

Endorsed: Filed January 13th, 1896. Edgar W. Jones, clerk supreme court.

3 We hereby waive the issuance and service of summons in error in this cause and hereby enter the voluntary appear-

ance of The Campbell Commission Co. herein as defendant in error.

Dated January 13th, 1896.

ASP, SHARTEL & COTTINGHAM,
Att'ys for Campbell Commission Co., Defendant in Error.

Endorsed: Filed January 13th, 1896. Edgar W. Jones, clerk of the supreme court.

3¼ THE CENTRAL LOAN AND TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error. } #419.

And now, to wit, on this fourth day of June, in the year of our Lord one thousand eight hundred and ninety-six, comes now J. W. Shartel, of counsel for appellee, and asks leave to file cross-assignment of errors in the above-entitled cause. The court, after consideration, denies the application.

3½ In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error.

Comes now the defendant in error and hereby assigns its cross-errors as follows for the consideration of said court in case the petition in error shall be sustained:

The defendant in error insists that the ruling of the court below would still be right in this case on the grounds stated in the motion and which were denied by the court below, and, in the event of the reversal of the court below on the grounds stated, alleges error in the court below:

First. In holding the notice for publication sufficient.

Second. In holding the attachment proceedings valid notwithstanding the failure to execute the bond or undertaking in attachment, and, in the event that the court below shall not be sustained upon the ground of its ruling, asks that said cause still be affirmed upon the grounds herein specified.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Defendant in Error.

Endorsed: In the supreme court of Oklahoma Territory. The Central Loan & Trust Co. *vs.* The Campbell Commission Co. Cross-petition in error. Filed June 4th, 1896. Edgar W. Jones, clerk supreme court. Asp, Shartel & Cottingham, att'ys for def't in error.

4 In the District Court of Noble County, Territory of Oklahoma, Sitting in and for the Fourth Judicial District of the County and Territory Aforesaid.

THE CENTRAL LOAN & TRUST COMPANY, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant. } Case-made.

Be it remembered that heretofore, to wit, on the 2nd day of July, A. D. 1895, the plaintiff, The Central Loan and Trust Company, a corporation, commenced an action against the defendant by filing in the district court of Noble county of that date its petition, which is in words and figures following, to wit:

Plaintiff complains of the said defendant, and for a cause of action states that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Texas.

The defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri.

That heretofore, to wit, on the 1st day of September, 1894, defendant executed in writing and delivered to Clark and Plumb its promissory note of that date and thereby promised to pay Clark and Plumb two years after date the sum of $15,000.00, with interest after date at 8% per annum until paid; that afterwards said Clark & Plumb, in the usual course of business and for a valuable consideration, endorsed said note in blank and delivered the same to the National Live Stock Bank of Fort Worth, Texas, and thereafter said note was, in the usual course of business and for a valuable consideration, sold and transferred to the plaintiff herein, who is now the owner and holder of said note; that no part of the principal sum of said note or interest thereon has ever been paid; that there is now due from plaintiff to defendant upon said note the
5 sum of $15,000.00, together with interest from the 1st day of September, 1894, at the rate of 8% per annum. A true copy of said note, with all the endorsements thereon, is hereto attached and marked Exhibit "A" and made a part of this petition.

Wherefore plaintiff prays judgment against said defendant, in accordance with the terms of said promissory note, for the sum of $15,000, together with interest from the 1st day of September, 1894, at the rate of 8% per annum; for the costs of this proceeding and other proper relief.

(Signed) HARRIS & LAFFERTY AND WM. D. WILLIAMS,
Attorneys for Plaintiff.

$15,000.00. KANSAS CITY, MO., *Sept. 1st*, 1894.

Two years after date, for value received, we promise to pay to Clark & Plumb or order fifteen thousand dollars, at the American National Bank of Kansas City, Mo., with interest after date at 8% per annum until paid.

Interest payable quarterly.

(Signed) CAMPBELL COMMISSION CO.
GEO. E. BLACK, *Treas.*

Endorsed on the back in the following words as follows: "Clark & Plumb."

6 And be it further remembered that on the 6th day of July the plaintiff filed its affidavit for attachment, which is in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.
} Affidavit for Attachment.

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

Wm. D. Williams, being duly sworn according to law, upon his oath states that he is the attorney for the plaintiff in the above-entitled action and has full power and authority to make this affidavit in its behalf; that said action is being brought in the district court of Noble county, Oklahoma Territory, against said defendant for the recovery of $15,000.00 and interest thereon, at the rate of 8% per annum, from the 1st day of September, 1894; that the nature of plaintiff's claim is as follows, to wit:

Upon a certain promissory note, dated September 1st, 1894, for the sum of $15,000.00, given by the Campbell Commission Company, a corporation, to Clerk & Plumb, a partnership, and transferred by endorsement and for consideration to the National Live Stock bank, at Fort Worth, Texas, and by said bank transferred in the usual course of business and for a valuable consideration to this plaintiff; that said claim is just; that affiant believes plaintiff ought to recover thereon the sum of $15,000.00, with interest, at — of 8% per annum, from the 1st day of September, 1894, and that
7 said defendant is a foreign corporation organized under and by virtue of the laws of the State of Missouri, and that said defendant is about to sell and convey its property with the fraudulent intent to hinder and delay its creditors in the collection of their debts; that said note will come due on the 1st day of September, 1895.

(Signed) WM. D. WILLIAMS.

Subscribed and sworn to before me this 2nd day of July, 1895.

(Signed) W. C. GLENN,
[SEAL.] *Dep. Dist. Clerk.*

7½ Be it further remembered that the plaintiff on July 2nd, 1895, filed its affidavit for application for attachment in words and figures —:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, Plaintiff, *vs.* THE CAMPBELL COMMISSION COMPANY, Defendant. } Application for Order Granting Attachment.

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

William D. Williams, being first duly sworn according to law, upon his oath states that he is attorney for plaintiff in the above-entitled action and has full power and authority to make this application and affidavit upon its behalf; that plaintiff has commenced an action in the district court of Noble county, Oklahoma Territory, against the said defendant for the recovery of $15,000.00 and interest thereon, at the rate of 8% per annum, from the 1st day of September, 1894, and has filed in said action its affidavit for attachment, which affidavit is hereby referred to and herewith presented as a part of this application.

That the judge of the district court in and for Noble county, Oklahoma Territory, is absent from said county.

(Signed) WM. D. WILLIAMS.

Subscribed and sworn to before me this 2nd day of July, 1895.

(Signed) W. C. GLENN,
Dep. Dist. Clerk.

8 Be it further remembered that on July 2nd, 1895, the Hon. A. R. Museller, probate judge, made an order allowing an attachment in said case, the same being in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff, *vs.* THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. } Order Allowing Attachment.

Now, on this 2nd day of July, 1895, it appearing to me, the undersigned, judge of the probate court in and for Noble county, Oklahoma Territory, from the petition and affidavit of the above-named plaintiff, by its attorney, that the plaintiff has commenced an action in said district court against the said defendant for the sum of $15,000.00, together with the interest thereon from the 1st day of September, 1894, at the rate of 8 % per annum, and that said claim is just, and that an order of attachment ought to issue herein, and that the judge of the district court in and for Noble county, Oklahoma Territory, is absent from the county, it is by me ordered that an attachment be granted in said cause on behalf of the plaintiff for

the sum of $16,000.00, the amount of plaintiff's claim, and $50.00, the probable costs of said action.

Witness my hand and the seal of this court this 2nd day of July, 1895.

(Signed) A. R. MUSELLER,
[SEAL.] *Judge Probate Court.*

Said petition being endorsed on the back in words and figures as follows, to wit:

"Central Loan & Trust Company *vs.* Campbell Commission Company. Petition. Filed July 2, 1895. J. H. Havighorst, clerk dist. court. $15.00 deposit."

9 And be it further remembered that on the 2nd day of July, 1895, plaintiff had præcipe for summons issued in said cause, the same being in words and figures as follows, to wit:

In the District Court of Noble County, Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. } No. —.

To the clerk of said court:

Issue summons in the above-entitled cause and direct the same to the sheriff of Noble county, Territory of Oklahoma, to or for the defendants, The Campbell Commission Co.

Amount claimed, $16,000.00 and 8 % interest from 1st day of July at 8 per cent. per annum.

Action brought for recovery on promissory note.

Make summons returnable 12th day of July, 1895, A. D. 1895.

Defendants required to answer on or before the 31st day of July, A. D. 1895.

Dated this 2nd day of July, 1895.

(Signed) WILLIAM D. WILLIAMS AND HARRIS & LAFFERTY,
Attorneys for Plaintiff.

Said præcipe for summons being endorsed on the back in words and figures as follows, to wit:

"No. —. District court, Noble county, O. T. Præcipe for summons. Central Loan and Trust Co. *vs.* Campbell Commission Co. William D. Williams and Harris & Lafferty, attorneys. Filed July 2nd, 1895. John H. Havighorst, clerk dist. court."

10 Be it remembered further that on July 2nd the following summons was issued in said cause:

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, Noble County, }

Fourth Judicial District.

The Territory of Oklahoma to the sheriff of Noble county, Oklahoma, Territory of Oklahoma, Greeting:

You are hereby commanded to notify the Campbell Commission Company that it has been sued by the Central Loan and Trust Company, a corporation, in the district court sitting in and for said county of Noble, and that unless it answers by the 31st day of July, A. D. 1895, the petition of the said plaintiff against them, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 12th day of July, A. D. 1895.

Witness my hand and the seal of said court, affixed at my office, in Perry, this 2nd day of July, A. D. 1895.

(Signed) J. H. HAVIGHORST, *Clerk*,
[SEAL.] By W. C. GLENN, *Deputy Clerk*.

Said summons being endorsed on the back in words and figures as follows, to wit:

"Summons. District court, Noble county, Oklahoma Territory. The Central Loan & Trust Co. *vs.* The Campbell Commission Co. Issued July 2nd, 1895. Returnable July 12th, 1895. Ans. due July 31st, 1895. Filed ——. —— ——, clerk. —— ——, attorneys for plaintiff.

I hereby certify the within to be a true copy of the orig-
11 inal summons with all the endorsements thereon. —— ——, sheriff. —— ——, under sheriff. —— ——, deputy.

Suit brought for recovery on promissory note. If defendant fails to answer, judgment will be taken for $16,000.00, with interest, at the rate of 8 per cent. per annum, from the 1st day of July, 1895, and costs of suit. J. H. Havighorst, clerk district court, per W. C. Glenn, deputy. Territory of Oklahoma, Noble county, *ss:* Received this writ July 2nd, 1895, and, as commanded herein, I summoned the following persons of the defendants herein named at the times following, to wit, ——, 189–, by delivering to each of said defendants personally in said county a true and certified copy of the within summons with all the endorsements thereon, and ——, 189–, by leaving for each of said defendants at — usual place of residence of each *of* said county a true and certified copy of the within summons with all the endorsements thereon.

The following persons of the defendants not found within said county, July 12th: The Campbell Commission Company. Sheriff's fees, —. Not found. 5c. Jno. A. Hansen, by C. Crawford, deputy."

12 Be it further remembered that on the 2nd day of July, 1895, the following order of attachment was issued in said cause:

TERRITORY OF OKLAHOMA, }
Fourth Judicial District. }

District Court of the Fourth Judicial District in and for Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST CO., Plaintiff, }
vs.
THE CAMPBELL COMMISSION CO., Defendant. }

The Territory of Oklahoma to the sheriff of Noble county, Greeting:

You are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, interests in stocks, rights, credits, moneys, and effects of the defendant not exempt by law from being applied to the payment of the claims of said plaintiff or so much thereof as will satisfy claim for sixteen thousand dollars and fifty dollars, the probable costs of this action. You will make due return of this order on the 12th day of July, A. D. 1895, 10 days after date.

Witness my hand and the seal of said court, affixed at my office, in the city of Perry, this 2nd day of July, 1895.

(Signed) J. H. HAVIGHORST, *Clerk*,
[SEAL.] By W. C. GLENN, *Deputy*.

Said order of attachment being endorsed on the back in words and figures as follows:

"Attachment order. The Central Loan and Trust Co., plaintiff, *vs.* The Campbell Commission Co., defendant. Issued July 2, 1895. Returnable July 12, 1895. Filed ——, 189–. —— ——, clerk. Sheriff's fees: Executing order first person, — .50; additional person, — 1; copy of order, — .25; appraisal and return, $1.75; taking and returning — bond, —; mileage, 100 miles, $10.00; serv-
13 ing — garnishee, —; — copy —; notice, —; mileage, — miles, —; appraiser's fees, $2.00; total, $14.50. For keeping property taken, 7 days keeping property, $296.00; three trips to White Eagle to see about cattle, 60 miles each, $18.00; $314.00. Total, $328.50. J. A. Hansen.

Received this order July 3rd, 1895. July 3rd, 1895, at 3.30 o'clock p. m., I executed the same by going to the place where the property of the within-named defendant, The Campbell Commission Co., described in the inventory and appraisement hereto annexed, was found, and there at 3.30 o'clock p. m. of said day, in the presence and hearing of A. C. Bell and Fid. Bishop, two credible persons, declared that by virtue of said order I attached said property at the suit of the within-named plaintiff, and with A. C. Bell and Fid. Bishop, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of all of said property attached, which inventory and appraisement was by me and said householders signed and is hereto annexed and returned with this order. I delivered a copy of this order, duly certified, to each of said defendants, —— ——. I cannot find the

within-named defendant, The Campbell Commission Co., in my county. Said property is in my custody, held subject to the order of the within-named court.

I delivered said property so attached to —— ——, in whose possession it was found upon the execution by such person in my presence of the undertaking herewith.

JNO. A. HANSEN, *Sheriff.*"

14 Be it further remembered that on the 2nd day of July the sheriff of Noble county, Oklahoma Territory, filed in said cause the following appraisement, in words and figures:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant. } Appraisement.

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

The undersigned, being first duly sworn to make a true inventory and appraisement of the following property attached as the property of the above-named defendant by John A. Hansen, sheriff, this 3rd day of July, 1895, finds that said property consists of five thousand head of steers, as near as we can ascertain, and that the actual value of said steers is twenty-five dollars per head, said property being levied upon in what is known as the "Bar El" pasture, in the Ponca reservation, in said county, and being all the cattle in said pasture except sixty-four head of stock cattle belonging to James Harris.

(Signed) A. C. BELL.
F. BISHOP.

Subscribed and sworn to before me this 3rd day of July, 1895.

(Signed) JOHN A. HANSEN, *Sheriff.*

The cattle mentioned, as near as could be ascertained, are branded as follows:

"D," "X," "C⌒⌒" "UU," "OX."

It was impossible to find out the exact number branded with each brand.

(Signed) J. A. HANSEN, *Sheriff.*

15 Be it remembered that thereafter, on the 6th day of July, A. D. 1895, the plaintiff filed an affidavit for garnishment in the following words and figures, to wit:

In the District Court of Noble County, Territory of Oklahoma.

THE CENTRAL LOAN & TRUST COMPANY, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant. } Garnishment Affidavit.

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

S. H. Harris, being of lawful age and first duly sworn, upon oath states that he is attorney for plaintiff in the above-entitled action, and has full power and authority to make this affidavit upon its behalf; that plaintiff's claim amounts to sixteen thousand dollars over and above all offsets; that plaintiff commenced this action July 2nd, 1895.

That he verily believes that A. H. Pierce has personal property in his possession and under his control belonging to said defendant and is indebted to said defendant; that defendant has not property sufficient to satisfy plaintiff's demand subject to execution, and that the property belonging to defendant in the hands of said Pierce and the amount owing by him to the said defendant is not exempt from execution.

That said defendant is a foreign corporation.

That said action is to recover damages on express contract.

(Signed) S. H. HARRIS.

Subscribed and sworn to before me this 6th day of July, 1895.

[SEAL.] (Signed) W. C. GLENN,
Dep. Dist. Clerk.

16 Said instrument being endorsed on the back in words and figures as follows, to wit:

"Central Loan & Trust Company, plaintiff, *vs.* Campbell Commission Company, defendant. Garnishment affidavit. Filed July 6, 1895. J. H. Havighorst, clerk dist. court."

17 Be it further remembered that thereafter, on the 8th day of July, 1895, garnishee summons was filed in said cause, said summons being in words and figures as follows:

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

In the District Court in and for said County.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant.

The Territory of Oklahoma to A. H. Pierce, garnishee:

You are hereby summoned, pursuant to the affidavit herein filed, as garnishee of the above-named defendant, and required on or before the date or return day, to wit, the 26th day of August, 1895, to answer according to law whether you are indebted to or have in

your possession or under your control any property, real or personal, belonging to the said defendant and file a copy of your answer with the clerk of the district court; and in case of your failure so to do you will be liable to further proceedings according to law, of which said defendant will also take notice.

(Signed) J. H. HAVIGHORST, *Clerk*,
[SEAL.] By W. C. GLENN, *Deputy*.

Said instrument being endorsed on the back in words and figures as follows, to wit:

"Garnishee summons. The Central Loan & Trust Co., plaintiff, *vs.* Campbell Commission Company, defendant. Filed July 8, 1895. J. H. Havighorst, clerk dist court." "Received this summons the 6th day of July, 1895, at 6.08 p. m; served the same July 6th, 1895, at 6.10 p. m., on A. H. Pierce by delivering to him a duly certified copy, with all the endorsements thereon. I cannot find Campbell Commission Company in my county. (Signed) Jno. A. Hansen, by C. Crawford, deputy."

Sheriff's Fees.

Serving summons	50
" 1 copy summons	25
	$ 75

18 Be it further remembered that thereafter and on the 29th day of July, 1895, the plaintiff filed its affidavit for publication, which is in words and figures as follows:

In the District Court of Noble County, Territory of Oklahoma.

THE CENTRAL LOAN & TRUST CO., a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION CO., a Corporation, Defendant.
} Affidavit for Service by Publication.

TERRITORY OF OKLAHOMA, *Noble County*, } *ss:*

S. H. Harris, being first duly sworn according to law, upon his oath states that he is attorney for plaintiff in the above-entitled action and has full power and authority to make this affidavit upon its behalf; that plaintiff filed its petition against said defendant in the above-entitled court on the 2nd day of July, 1895, and on the same day caused a summons to issue in said action, which summons was returned by the sheriff of said county "Not found;" that defendant is a foreign corporation, having no agent or officer in said Territory upon whom service of summons can be had, and that plaintiff, with due diligence, is unable to make service of summons upon said defendant; that upon this 2nd day of July, 1895, said

plaintiff caused a writ of attachment to issue in said cause and levied by the sheriff of said county upon about five thousand head of cattle in said county belonging to said defendant; that said cattle, the property of said defendant, the plaintiff seeks to apply by attachment proceedings to the payment of its claim against said
19 defendant, amounting to sixteen thousand dollars, together with interest and costs. Affiant further states that said defendant has debts owing to it in said county and plaintiff has caused a summons in garnishment to issue in said cause and be served upon one A. H. Pierce.

(Signed) S. H. HARRIS.

Subscribed and sworn to before me this 29th day of July, 1895.

(Signed) E. F. TEBBE,

[SEAL.] *Deputy Clerk District Court.*

Endorsed on the back in words and figures as follows, to wit: "Central Loan & Trust Co. *vs.* Campbell Commission Co. Affidavit for publication. Filed this 29th day of July, 1895. J. H. Havighorst, clerk of dist. court."

20 Thereafter proof of publication was filed in said cause in words and figures as follows:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST CO., a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION CO., a Corporation, Defendant.
} Publication Notice.

The above-named defendant will take notice that it has been sued by the above-named plaintiff in the above-entitled court; that plaintiff filed its petition against said defendant in said court on the 2nd day of July, 1895, praying judgment against said defendant for the sum of sixteen thousand dollars, with interest thereon from said date at the rate of 8% per cent. per annum, and for costs of suit, and that said suit is upon a promissory note executed and delivered by defendant to Clark & Plumb, and by said Clark & Plumb transferred in the regular course of business to the National Live Stock Bank of Fort Worth, Texas, and by said bank transferred in the usual course of business to this plaintiff; that at the time of filing said action plaintiff procured an order allowing an attachment to issue in said action for the sum of sixteen thousand dollars, which attachment so granted was, on the 3rd day of July, 1895, duly levied upon five thousand head of cattle, steers, the property of the said defendant in what is known as the "Bar El" pasture on the Ponca reservation, attached to said county for judicial purposes; that on the 6th day of July, 1895, plaintiff caused a summons in garnishment to be issued in said action and served upon A. H. Pierce. The defendant must answer said petition on or before the 13th day of September,

1895, of said petition will be taken as true, an order of sale
21 issued against said attached property, and judgment rendered against said defendant for the amount prayed for in said petition as soon as said promissory note shall become due, which will be the 5th day of September, 1895.

(Signed) J. H. HAVIGHORST,
Clerk District Court,
By E. F. TEBBE, *Deputy.*

HARRIS & LAFFERTY AND
WILLIAM D. WILLIAMS,
Attorneys for Plaintiff.

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

PERRY, OKLAHOMA TERRITORY, *Nov.* 11, 1895.

Chas. D. Merrill, of lawful age, being first duly sworn, deposes and says that he is the publisher of the Perry Democrat, a weekly newspaper printed and published in the city of Perry, Oklahoma Territory, and that a notice, of which a true copy is hereto attached, was published in the regular and entire issue of each number of said Democrat for three consecutive weeks, the first publication being made on the 1st day of August, A. D. 1895, and the last on the 18th day of August, A. D. 1895.

(Signed) CHAS. D. MERRELL.

Subscribed and sworn to before me this 11th day of Nov., A. D. 1895.

(Signed) E. F. TEBBE,
Deputy District Clerk.

Endorsed on back as follows: Filed Nov. 11, '95. J. H. Havighorst, clerk.

22 Be it further remembered that thereafter, and on the 26th day of August, A. H. Pierce filed an interplea in said cause in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff, }
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. }

Now, on this day, comes the said A. H. Pierce, and by leave of court files this his interplea in the above-entitled cause, claiming the property heretofore levied upon by the sheriff under the writ of attachment and garnishment in the above-entitled cause, and in support of his interplea said interpleader, said A. H. Pierce, says—

That he, the said A. H. Pierce, is entitled to the immediate possession of said five thousand head of steers.

That said five thousand head of steers *is* wrongfully detained from said interpleader, A. H. Pierce, by the plaintiff in this action, through and by the sheriff — for and in behalf of the said plaintiff levied said execution and garnishment on said five thousand head of steers.

Said A. H. Pierce, interpleader, further states that said five thousand head of steers have not at any time been taken in execution or any order or judgment against said A. H. Pierce or for the payment of any tax, fine, or amercement assessed against him or by virtue of any order of delivery whatsoever or by virtue of any other mense or final process against said interpleader, A. H. Pierce.

Said interpleader, A. H. Pierce, states that said five thousand head of steers so wrongfully levied upon and detained from
23 this interpleader are of the value of and are worth the sum of $125,000.

Wherefore the said A. H. Pierce prays judgment that the court on the hearing of this interplea will give judgment in his favor and against plaintiff in said action for the return to this interpleader of said five thousand head of steers, for the damages, amounting to the sum of $10,000.00, for said wrongful seizure and detention of said five thousand head of steers, and for the costs of this action.

(Signed) A. H. PIERCE.

Subscribed and sworn to before me this 22nd day of August, A. D. 1895.

(Signed) ODUS G. YOUNG,
[SEAL.] *Notary Public within and for Jackson Co., Mo.*

My term expires Oct. 28, 1897.

Said instrument being endorsed on the back as follows:

"Central Loan & Trust Company *vs.* Campbell Commission Company. Interpleader of A. H. Pierce. Filed Aug. 26th, '95. J. H. Havighorst, clerk. E. F. Tebbe, deputy."

24 Be it further remembered that on the 26th day of Aug., 1895, A. H. Pierce filed a motion to discharge attachment in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant; A. H. PIERCE, Interpleader and Garnishee.

To the above-named plaintiff and Harris & Lafferty, their attorneys of record:

You and each of you will take notice that the garnishee and interpleader has filed in the district court in the above-entitled cause a motion to discharge the attachment in said cause; that the motion is made upon the following grounds, to wit:

1st. That the property attached does not belong to the defendant, but to this garnishee and interpleader.

2nd. That at the time of this attachment the interpleader was in possession and also had possession and the legal title to said property.

3rd. That the allegations and grounds alleged as a basis for said attachment were untrue as to this defendant.

4th. That at the time of said attachment and garnishment this garnishee had no property, real or personal, belonging to defendant in his possession or under his control.

5th. That the defendant had no title, legal or equitable, whatever in the property levied upon under the attachment.

25 6th. That at the time of the service of the attachment the garnishee owed the defendant nothing, nor does he now owe the defendant anything whatever.

That said motion will be called for hearing before the Hon. A. G. C. Bierer, judge of the district court of Noble county, at Perry, on the 7th day of September, 1895, or as soon thereafter as the counsel can be heard.

(Signed) HENRY M. WITHERS.

Service acknowledged this 26th day of August, 1895.

(Signed) HARRIS & LAFFERTY,
Attorneys for Plaintiff.

Said instrument being endorsed on the back in the following words and figures, to wit: ——.

26 Be it further remembered that on the 26th day of August, 1895, said A. H. Pierce filed the following motion to dismiss attachment in this cause in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff, *vs.* THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.	Motion.

Comes now the above-named interpleader and garnishee and moves the court to discharge the attachment issued in this cause for the following reasons, to wit:

1st. That the property attached does not belong to the defendant, but to this garnishee and interpleader.

2nd. That at the time of the attachment the interpleader was in possession and also had possession and the legal title to said property.

3rd. That the allegations and grounds alleged as a basis for said attachment were untrue as to this defendant.

4th. That at the time of said attachment and garnishment this

garnishee had no property, real or personal, belonging to defendant in his possession or under his control.

5th. That the defendant had no title, legal or equitable, whatever in the property levied on under the attachment.

6th. That at the time of the service of the attachment the garnishee herein owed the defendant nothing, nor does he now owe the defendant anything whatever.

(Signed) HENRY M. WITHERS,
Att'y for Garnishee and Interpleader.

27 Said instrument being endorsed on the back thereof in words and figures as follows, to wit:

"Central Loan & Trust Co. *vs.* Campbell Commission Company. Motion to dismiss attachment by Pierce, garnishee. Filed Aug. 26, '95. J. H. Havighorst, clerk."

Be it remembered that thereafter, on the 26th day of August, 1895, A. H. Pierce filed his interplea in said cause in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant; A. H. Pierce, Garnishee. } Answer of Garnishee.

Now, on this day, comes the said A. H. Pierce, the above-named garnishee, and makes answer to the garnishment herein served on him on the 6th day of July, A. D. 1895, and for answer says—

That on the 6th day of July, A. D. 1895, he was served with a garnishment summons in the above-entitled action.

The he was then and is now in no manner and upon no account indebted or under liability to the defendant, the said Campbell Commission Company, and that he, the said garnishee, then had and now has in his possession or under his control no real estate
28 and no personal property, effects, or credit*o*rs of any description whatever belonging to said defendant or in which he has any interest, and that he is in no manner liable as garnishee in this action.

For further and special answer the said A. H. Pierce, garnishee, sa*y*d that on the 8th day of September, 1894, he, the said garnishee, A. H. Pierce, entered into and with the defendant, The Campbell Commission Company, they both subscribed a contract and agreement in writing; which said contract and agreement in writing are in words and figures as follows, to wit:

This agreement made and entered into by and between A. H. Pierce of Wharton county, Texas, party of the first part and the

Campbell Commission Company, in the live-stock business, doing business at Chicago, St. Louis, Kansas City and Omaha, party of the second part, witnesseth:

That the party of the first part is to have ready and gathered for shipment on or about the 25th day of March, to the 15th day of April, 1895, all the four-year-old steers and upwards belonging to himself and J. E. Pierce, that can be gathered with reasonable diligence, no stags, cripples, big-jaws or deformities to be included in this contract, and to such steers of the ages above stated as are common to that portion of Texas. That said party of the first part is to have five thousand steers more or less put on board the cars at Pierce Station, Wharton county, Texas, ready for shipment, at his own expense, as rapidly as a railroad furnishes and handles and places same. The party of the second part hereby agrees to take charge of said steers at Pierce Station, Texas, upon the delivery on board the cars of said steers, and ship them to their pastures in the Indian Territory, at their own risk, and pay all freight and other expenses, and give said steers good and sufficient pasture and attention; and further agrees to ship said steers to market during the summer or fall of 1895 for account of the party of the first part. The proceeds of the same of said steers are to be applied to the payment for said steers until the whole number so delivered shall have been fully paid for, at the rate of fifteen dollars per head, on board the cars at Pierce Station, Texas.

It is distinctly understood and agreed by the parties hereto, that the title of said steers shall be and remain in the party of the first part until the sum of fifteen dollars per head is fully paid by the party of the second part to the party of the first part, for each and every steer delivered on board the cars at Pierce Station, Texas, for shipment to the party of the second part. This amount of fifteen dollars per head is to be paid for each steer so delivered net to the party of the first part, the freight and all other expenses to be paid by the party of the second part, in addition to the sum of fifteen dollars per head.

It is further agreed and understood by the parties hereto, that the party of the first part may put a man with said steers as his agent, in the pasture of the second party, to represent his interest in said steers said man to be paid fifty dollars per month by the said party of the second part, from the date of shipment of said steers from Pierce Station Texas, until said steers shall have been shipped to market or fully paid for, and also furnish him horses to ride and board and lodge him free of cost to the party of the first part during his stay with said steers. Said man is to look exclusively after said herd of cattle and to obey the instructions of the party of the
29 second part. The sum of five thousand dollars is hereby paid by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part, at the signing of this agreement as part of the purchase price.

The party of the second part agrees to pay the party of the first part, interest at the rate of 10 % per annum on all unpaid amounts from the date of the shipments of said cattle from Pierce Station,

Texas, until full and final payments are made in accordance with this agreement.

It is further understood and agreed that the party of the second part has the right to select from these above-mentioned steers ten or twelve hundred for the purpose of feeding the same, on or before November 1st, 1894, which are to be fed in the Hotl pasture at Matagorda county, Texas; and when they are ready for shipment the party of the second part is to pay to the party of the first part the amount of fifteen dollars per head before they are put on board cars for shipment.

It is understood that the cattle are to be delivered for the purpose of feeding, and are to be branded at the time of delivery, with the letter "C" and that said party of the second part is to furnish branding irons, the party of the first part to do the branding.

This contract signed in duplicate this 8th day of September, 1894, at Kansas City, Mo.

(Signed) A. H. PIERCE.
(Signed) CAMPBELL COMMISSION CO.,
By JAMES H. CAMPBELL, *Pres.*

Attest:
(Signed) WM. ALBRITIAN.
(Signed) HENRY M. WITHERS.

Said garnishee, A. H. Pierce, further states that in accordance with and in pursuance of said written contract and agreement so executed by said garnishee, A. H. Pierce, and said defendant, Campbell Commission Co., he, the said A. H. Pierce, shipped from Pierce Station, Texas, to the pasture of the Campbell Commission Company about seven thousand head of cattle, of which there still remains in said pastures in Indian Territory at the time of the institution of this suit and the service of this garnishment about five thousand head; which last five thousand head were, are now, and always have been in the possession of said garnishee, A. H. Pierce, but that plaintiff has endeavored to levy its said attachment and garnishment on said five thousand head.

Said garnishee, A. H. Pierce, further answering, states that save and except only the sum of five thousand dollars mentioned in said written contract and agreement, and which sum was received by this garnishee, A. H. Pierce, at the time of the execution of said contract as aforesaid, the purchase price of fifteen dollars per head for each and every one of said steers has never been paid to this garnishee, A. H. Pierce, by said Campbell Commission Company or by any other person for it, but the said fifteen dollars for each and every one of said steers remains, save and except said payment of five thousand dollars, wholly unpaid, together with interest thereon according to the stipulation of said contract.

That said steers are subject to a further charge aggregating about the sum of — dollars which was expended by this garnishee, A. H. Pierce, in the care and keeping of said steers, but which sum should, in accordance with the terms of said written contract and agreement, have been paid by said Campbell Commission Company, but *were*

paid by this garnishee in consequence of its failure to pay the same as provided for by said written contract and agreement.

Said garnishee, A. H. Pierce, further states that of said seven thousand steers about two thousand of that number were fed at the pastures in Matagorda county, Texas, pursuant to said contract, and, being afterwards marketed and sold, about the sum of fourteen hundred dollars was due to this garnishee, A. H. Pierce, as the purchase price to this garnishee thereof, on account of said last-mentioned cattle; and thereupon it was agreed between this garnishee, A. H. Pierce, and said defendant, Campbell Commission Company, that said fourteen hundred dollars should be and remain, until the payment thereof to said A. H. Pierce, a charge against said remaining five thousand head of cattle in said Indian Territory, and that the title to said five thousand head of cattle should not pass from this garnishee until the payment of said fourteen hundred dollars, in addition to the amounts aforesaid.

Said garnishee further states that said fourteen hundred dollars still remains wholly due and unpaid.

Said garnishee, A. H. Pierce, further states that prior to July 6th, A. D. 1895, this garnishee received notice that an assignment had been made of said contract by the said Campbell Commission Company to T. A. Stoddard as trustee; which assignment is in words and figures as follows, to wit:

31 KANSAS CITY, MO., *July 1st*, 1895.

Whereas the Campbell Commission Company has become liable on other certain promissory notes herein described, and has by reason of endorsement and being desirous of securing said indebtedness, they hereby sell and assign all the right, title, and interest in and to a certain contract made and signed and delivered in duplicate on the 8th day of September, 1894, by and between A. H. Pierce, of Wharton county, Texas, and the Campbell Commission Company to T. A. Stoddard, as trustee, of St. Louis, Missouri, for the said purpose of securing the following-described paper, to wit:

First. Third National Bank of St. Louis, one note, dated April 23rd, 1895, due October 26th, 1895, signed by the Campbell Commission Company, $10,000.00.

Second. National Live Stock bank, Chicago, note dated June 17, 1895, due on demand, signed by Campbell Commission Company, $10,000.00.

Third. The Northwestern National bank, Chicago, Illinois, on demand, note, $4,500.00, signed by Campbell Commission Company.

Fourth. National Park bank, New York city, one note dated March 11th, 1895, due July 4th, 1895, $3,000.00; one note dated March 21, due July 14th, 1895, $2,000.00; all of the above notes being signed by G. W. Miller & Son—G. W. and J. C. Miller—payable to and endorsed by the Campbell Commission Company.

Which said trustee shall have the rights and privileges granted under said contract for the purpose aforesaid, and shall be empowered to do all acts and things that the said Campbell Commission Company are permitted to do under said contract and to apply pro-

ceeds derived therefrom to the payment of said notes heretofore described proportionately.

In witness whereof the said corporation has caused these presents to be executed by its proper office and its corporate seal affixed this 1st day of July, 1895.

[SEAL.] (Signed) CAMPBELL COMMISSION COMPANY.

Said garnishee, A. H. Pierce, is informed, and so charged, that by reason and in virtue of the said assignment all the right, title, and interest of said Campbell Commission Company of, in, and to said contract, whatever the same may have been at the time of said assignment, vested, became transferred to and is now owned and held by said Stoddard as such trustee.

Said garnishee, A. H. Pierce, further answering, says that on the 12th day of July, A. D. 1895, the said Campbell Commission Company was, by the order and decree duly rendered and given of the United States circuit court for the western division of the western district of Missouri, together with all of its assets and property wherever situated, placed in the hands of a receiver, and that by such order and decree George E. Black and Geo. A. Neal were duly appointed such receivers, and that said order and decree last mentioned are still in full force.

32 The premises considered, said garnishee, A. H. Pierce, prays to be discharged from this garnishment, and that said garnishment be dismissed, and that the court will make proper allowances for the expenses and reasonable attorneys' fees in the making of this answer and in defense of this action as garnishee.

STATE OF MISSOURI, } ss:
County of Jackson, }

A. H. Pierce, the said garnishee, being duly sworn, on his oath says that he has read the foregoing answer, and that the statements, allegations, and matters therein contained are true except so far as stated on information and belief, and as to such matters he believes them to be true.

(Signed) A. H. PIERCE.

Subscribed and sworn to before me this 24th day of August, A. D. 1895.

My term expires Oct. 28th, 1897.

(Signed) ODUS G. YOUNG,

[SEAL.] *Notary Public within and for Jackson Co., Mo.*

HENRY M. WITHERS,
Att'y for Garnishee.

Said instrument being endorsed on the back thereof in words and figures as follows, to wit:

"Central Loan & Trust Company *vs.* Campbell Commission Company. Filed Aug. 26, '95. J. H. Havighorst, clerk. E. F. Tebbe, deputy. Answer of garnishee, A. H. Pierce."

33 Be it remembered that on the 7th day of September, 1895, plaintiff filed its application for the appointment of a receiver in said cause in words and figures as follows, to wit:

In the District Court of Noble County, Territory of Oklahoma.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.
} Application for Appointment of Receiver.

Now comes the above-named plaintiff, by its attorneys, Harris & Lafferty and William D. Williams, and moves the court to appoint A. H. Pierce as receiver to take charge of the property attached in this action and sell the same in accordance with a certain written contract between the defendant herein and A. H. Pierce, a true copy of which is hereto attached and marked Exhibit "A" and made a part hereof, and that said A. H. Pierce, as receiver, be required to account to the court for all moneys coming into his hands as such receiver and to render to the clerk of this court a complete statement of all shipments of cattle, including the date of shipment, to whom consigned, to whom sold, the price received, and the amount of expenses chargeable to said shipment, and to make such other and further statements and reports to the court as may be ordered by the court, and for reason why this motion should be granted plaintiff states the following to be the facts:

That on the 2nd day of July, 1895, plaintiff filed its action against said defendant in the above-entitled court and procured an order of attachment to be issued out of said court and levied upon about five thousand head of steers as the property of defendant in said county.

34 That said steers are now worth about the sum of $125,000.00.

That said property has been under the care, custody, and control of the sheriff of Noble county since the 3rd day of July, 1895, when said attachment was levied.

That the claim of plaintiff against the defendant secured by said attachment upon the steers amount*ing* at the time of said levy to the sum of $16,000.00.

That said A. H. Pierce claims no interest in said property or this suit except as set forth in said contract hereto attached, and is entirely friendly to all parties concerned in said action, and, as plaintiff and its attorneys are informed and believe, the appointment of said A. H. Pierce as receiver herein would be entirely satisfactory to the defendants and all other parties in said action.

That said A. H. Pierce is possessed of large wealth over and above all his liabilities and debts and would be entirely responsible individually for any breach of his duty as such receiver, and the making of a bond in the amount of said cattle would be an impossibility on account of the large amount involved and the scarcity of men within the jurisdiction of this court who are possessed of

such a large amount of wealth or any considerable part thereof; that the appointment of the said A. H. Pierce as receiver without bond would be entirely satisfactory to all parties concerned, and all parties interested in said property or this controversy are willing to rely upon the individual wealth and responsibility of said A. H. Pierce in case he is appointed receiver herein.

That said A. H. Pierce is an experienced cattle dealer and raiser and shipper, having been engaged in the business of raising and selling cattle at his pastures and in the city markets for a number of years upon a large scale; that the sheriff of this county is not an experienced dealer in cattle and has little or no experience
35 in shipping cattle to and selling in city markets; that said five thousand head of steers, except what has been shipped and sold by said A. H. Pierce, are now in a pasture in the Ponca reservation and are in good condition for shipment and ought to be placed upon the market at once; that it would be impracticable to sell said steers as upon execution, and all parties interested herein desire that they be sold on the city market in the usual course of business and for the best price obtainable, and that there is no demand for such an amount and quality of fat cattle in this county, and if said cattle were sold at public sale in this county they would not bring anything near their actual value in market if properly handled and sold in the usual course of dealing.

That it would be to the interest of all parties concerned to have A. H. Pierce appointed receiver to take charge of said steers and sell the same to the best advantage, accounting to the court for all sales, and, after satisfying his claim under said contract, hold the money remaining in his hands subject to the final order of this court.

That said A. H. Pierce has already shipped from five thousand head of steers so seized in attachment about three hundred and sixty head and sold the same in market and now holds the proceeds thereof, which should be accounted for by said A. H. Pierce along with other accounts of shipments.

(Signed) HARRIS & LAFFERTY,
Attorneys for Plaintiff.

36 "This agreement made and entered into by and between A. H. Pierce of Wharton county, Texas, party of the first part, and the Campbell Commission Company, in the live stock business, doing business at Chicago, St. Louis, Kansas City, Omaha, party of the second part, witnesseth:

That the party of the first part is to have gathered and ready for shipment on or about the 25th day of March to the 15th day of April, 1895, all the four-year-old steers and upwards, belonging to himself and J. E. Pierce that can be gathered with reasonable diligence, no stags, cripples, big-jaws or deformities to be included in this contract, and to be such steers of the ages above stated as are common to that portion of Texas; the said party of the first part is to have five thousand steers, more or less, put on board the cars at Pierce Station, Wharton county, Texas, ready for shipment at his

own expense as rapidly as a railroad furnishes and handles and places them. The party of the second part hereby agrees to take charge of said steers at Pierce Station, Texas, upon the delivery on board the cars of said steers, and ship them to their pastures in the Indian Territory, at its own risk and pay all freights and other expenses and give all said steers good and sufficient pasture and attention; and further agrees to ship said steers to market during the summer or fall of 1895, for account of the party of the first part.

The proceeds of the sale of said steers are to be applied to the payment of said steers until whole number so delivered shall have been fully paid for at the rate of fifteen dollars per head on board the cars at Pierce Station, Texas.

It is distinctly agreed and understood by the parties hereto *and* that title and ownership of said steers shall be and remain in the party of the first part until the sum of fifteen dollars per head is fully paid by the party of the second part to the party of the first part for each and every steer delivered on board the cars *are* Pierce Station, Texas, for shipment to the party of the second part.

37 This amount of fifteen dollars per head is to be paid for each steer so delivered, net, to the party of the first part; the freight and all other expenses to be paid by the party of the second part, in addition to the sum of fifteen dollars per head.

It is further agreed and understood by the parties hereto that the party of the first part may put a man with the said steers as his agent, in the pastures of the second party, to represent his interests in said steers, said man to be paid fifty dollars per month by the said party of the second part, from the date of shipment of said steers from Pierce Station, Texas, until said steers shall have been shipped to market or fully paid for, and also furnish him horses to ride, and board and lodge him free of cost to the party of the first part during his stay with said steers. Said man to look exclusively after said herd of cattle, and is to obey the instructions of the party of the second part. The sum of five thousand dollars is hereby paid by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part, at the signing of this agreement, as part of the purchase price.

The party of the second part agrees to pay the party of the first part, interest at the rate of ten per cent. per annum on all unpaid amounts from the date of shipment of said cattle from Pierce Station, Texas, until full and final payments are made in accordance with this agreement.

It is further understood and agreed that the party of the second part has a right to select from these above-mentioned steers ten or twelve hundred for the purpose of feeding the same, on or before November 1st, 1894, which are to be fed in the Holt pasture in Matagorda county, Texas; and that when they are ready for shipment that party of the second part is to pay to the party of the first part the amount of fifteen dollars per head before they are put on board the cars for shipment.

38 It is understood that the cattle that are to be delivered for the purpose of feeding, are to be branded at the time of delivered with the letter 'C' and that said party of the second

part is to furnish the branding irons, the party of the first part to do the branding.

This contract signed in duplicate this 8th day of September, 1894, at Kansas City, Missouri.

(Signed) CAMPBELL COMMISSION COMPANY,
By JAMES H. CAMPBELL, *Pres.*
(Signed) A. H. PIERCE.

Attest:
(Signed) WM. ALLBRITAIN.
(Signed) HENRY M. WITHERS."

39 TERRITORY OF OKLAHOMA, } *ss:*
Noble County, }

S. H. Harris, being first duly sworn, upon his oath deposes and says that he has read the above and foregoing application and knows the contents thereof, and that the statements therein contained are true, and that he is one of the attorneys for plaintiff, a foreign corporation.

(Signed) S. H. HARRIS.

Subscribed and sworn to before me this 7th day of September, 1895.
(Signed) W. C. GLENN,
Deputy Dist. Cl'k.

Said instrument being endorsed on the back in words and figures as follows, to wit: "Central L. & T. Co. *vs.* Campbell Com. Co. Motion for appointment of receiver. Filed September 7th, 1895. J. H. Havighorst, clerk. W. C. Glenn, dep."

40 Be it further remembered that on the 9th day of September the following order appointing a receiver in said cause was filed therein:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.
} Order Appointing Receiver.

And now, on this 7th day of September, 1895, the same being one of the regular judicial days of the April term of the above-entitled court, this cause comes on for hearing upon the application of the plaintiff for an order appointing A. H. Pierce as receiver to take charge of the attached property herein and sell the same in accordance with a certain written contract between said A. H. Pierce and the Campbell Commission Company, a copy of which contract is attached to said application; and the court, being fully advised in the premises, finds that an order of attachment was issued out of

said court on the 3rd day of July, 1895, at the suit of the plaintiff and levied on the same day upon about five thousand head of steers as the property of said defendant, which property has since been in the hands of the sheriff of Noble county; that A. H. Pierce is a suitable person to be appointed receiver to take charge of said cattle and sell the same and account to the court for the proceeds, and that it would be to the interest of all parties concerned to have A. H. Pierce appointed receiver, empowered and instructed; that said A. H. Pierce is entirely responsible, and that it would be safe to entrust him as receiver with the management of said property without bond, and that on account of the large amount involved it would be impracticable to procure bond in this county, and
41 that it would be to the interest of all parties to have said steers sold in the market in the usual course of dealing by an experienced dealer; that said A. H. Pierce claims no interest in said property other than that set forth in said contract and is entirely friendly to all parties concerned; that said steers are now ready and suitable for market, and that it would be impracticable to longer hold said steers in the hands of the officers of this court.

The court further finds that there is no demand in this county for such an amount and quality of cattle, and that a sale of the same in this county at public auction would probably occasion great loss to the parties entitled to the proceeds of said cattle, and that it would be to the interest of all parties to have said cattle sold in market in the usual course of dealing and in accordance with the contract between said Pierce and the defendant herein.

And the court further finds that said A. H. Pierce has already shipped of the five thousand head of steers three hundred and sixty head, and that the same have been sold, and that the proceeds thereof are still in the hands of the said A. H. Pierce.

It is therefore considered, ordered, and adjudged by the court that said A. H. Pierce be, and he is hereby, appointed receiver to take charge of said attached property, and to sell the same in accordance with said written contract and for the best price obtainable, accounting to the clerk of this court for each shipment of said steers, setting out completely all things done by him in relation thereto, including the time of shipment, the number of steers shipped, to whom consigned, by whom and to whom sold, the price received, and the expense chargeable to said shipment, and after applying the proceeds of said steers to the payment of the amount due him under the terms of said contract he shall hold the remainder of the proceeds of said cattle, if any there be, subject to the order of the court, and shall, when required by the court, make a complete and final report of all of his doings as receiver herein.

42 It is further ordered and adjudged by the court that said receiver be not required to give a bond herein, unless, upon good cause shown by some person interested, the court make an order requiring said receiver to give a bond to such persons and in such sum as the court may deem proper.

This order is not intended to affect the rights of any person not a party to this action, and the proceeding is not considered as a

waiver of any legal rights of any party to this action further than is expressed or necessarily implied.

O K. (Signed) A. G. C. BIERER, *Judge.*

WITHERS,
Attorney for Pierce.
HARRIS & LAFFERTY,
Attorneys for Pl'ff.

Endorsed on the back as follows: "Central L. & T. Co. *vs.* Campbell Com. Co. Journal entry. Filed Sept. 9th, 1895. Jno. H. Havighorst, cl'k."

43 In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST CO., a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION CO., a Corporation, Defendant.
} Oath of Receiver.

TERRITORY OF OKLAHOMA, *Noble County,* } *ss:*

A. H. Pierce, being first duly sworn, upon his oath deposes and says that he will faithfully, honestly, and conscientiously perform the duties of receiver in the above-entitled action and render his account to the court when ordered so to do, and obey all orders of the court concerning the property attached in the above action.

(Signed) A. H. PIERCE.

Subscribed and sworn to before me this the 13th day of September, 1895.

(Signed) E. F. TEBBE,
[SEAL.] *Deputy District Court Clerk.*

I, A. H. Pierce, hereby accept the office of receiver in the above-entitled action under the order of the court made therein on the 7th day of September, 1895.

(Signed) A. H. PIERCE.

Said instrument being endorsed on the back in words and figures as follows, to wit:

"Central L. & T. Co. *vs.* Campbell Com. Co. Oath of Pierce and acceptance. Filed Sep. 13th, 1895. J. H. Havighorst, clerk. E. F. Tebbe, deputy."

44 Be it further remembered that thereafter and on the 25th day of September, 1895, plaintiff filed its motion in said court and cause in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST CO., Plaintiff,
vs.
THE CAMPBELL COMMISSION CO., Defendant. } Motion.

Comes now the plaintiff and moves the court for an order requiring W. A. Stoddard, of St. Louis, Mo., trustee, to interplead in this action, and for grounds for this motion states that it is shown by the answer of A. H. Pierce, garnishee in the above-entitled action, that W. A. Stoddard claims an interest in the cattle attached in this action by reason of an assignment to him from the Campbell Commission Company of a certain contract, subject-matter of which is the cattle attached.

(Signed) HARRIS & LAFFERTY,
Attorneys for Plaintiff.

Endorsed on the back as follows, in words and figures: "Central Loan and T. Co. *vs.* Campbell Com. Co. Motion. Filed Sept. 25th, '95. J. H. Havighorst, clerk. E. F. Tebbe, deputy."

45 Be it further remembered that on the 10th day of October, 1895, the following order was made in said cause in words and figures as follows:

In the District Court of Noble County, Oklahoma Territory.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. } Journal Entry.

Now, on this 26th day of September, 1895, this cause came on for hearing on the motion of plaintiff to require one T. A. Stoddard, trustee, of St. Louis, Mo., to interplead in the above action. It is found that the said T. A. Stoddard, trustee, of St. Louis, Mo., is made a party defendant in this suit, and that he interplead herein and state forth his interest, whatever it may be, that he claims to have as such trustee of the property now in the hands of the receiver in this action.

And it is further ordered by the court that notice shall be given to said T. A. Stoddard, trustee, St. Louis, Mo., by delivering to him a copy of this order by the sheriff of the city of St. Louis, Mo.

And it is further ordered and adjudged by the court that in case the said T. A. Stoddard, trustee, St. Louis, Mo., fails to answer and interplead in said action within twenty days from the date of the service of this order, stating therein his claim to said property and defense in said action or in defense to garnishment made, judgment shall be rendered against him that shall forfeit and bar him as trustee from any claim in and to the property attached in above action and now in the possession of A. H. Pierce, receiver herein.

(Signed) A. G. C. BIERER, *Judge.*

46 STATE OF MISSOURI, } ss:
County of St. Louis, }

I, Henry Troll, being first duly sworn, upon oath depose and say that I am the duly elected, qualified, and acting sheriff of the city of St. Louis, State of Missouri, and that I served the within order of court upon T. A. Stoddard, trustee, by delivering to him a true and correct copy thereof on the 4th day of October, 1895.

(Signed) HENRY TROLL, *Sheriff.*

Subscribed and sworn to before me this 5th day of October, 1895.

(Signed) TOS. B. RODGERS,

[SEAL.] *Clerk of Circuit Court, City of St. Louis, Mo.*

Said journal entry being endorsed as follows: "Central L. & T. Co. *vs.* Campbell Commission Co. Order citing T. A. Stoddard to appear. Filed October 10, '95. J. H. Havighorst, clerk, by E. F. Tebbe, deputy."

47 Be it further remembered that on the 21st day of September, 1895, T. A. Stoddard filed the following interplea in said cause, the same being in words and figures as follows, to wit:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, Plaintiff, *vs.* THE CAMPBELL COMMISSION COMPANY, Defendant.	Interplea of T. A. Stoddard, Trustee.

And now, at this day, comes the said T. A. Stoddard, trustee, and files this his interplea and claims the property claimed to have been attached and garnisheed in this cause and the proceeds derived from the sale thereof, subject to the claims and rights thereto and ownership thereof of A. H. Pierce, the garnishee in this action, and in support of this his interplea said interpleader, T. A. Stoddard, trustee, states that on the 8th day of September, 1894, and for a long time prior thereto one George W. Miller and his son, Joseph C. Miller, were doing business under the firm name and style of George W. Miller & Son, *and* in the States of Kansas and Texas and in the Indian Territory and the Territory of Oklahoma, in the purchase of cattle and in grazing and feeding the same for market.

That during said period and from and after said September 8th, 1894, up to July 12th, 1895, said Campbell Commission Company herein was engaged in Kansas City, St. Louis, and Chicago, and in other cities in the business of selling live stock on commission and for procuring for persons engaged in grazing and feeding cattle in said States and Territories loans and advancements from the banks on proper and sufficient security to enable such persons to pay the costs and expenses of such grazing and feeding, as
48 also the cost and freight of *of* shipping such cattle before realizing thereon by a sale thereof.

That during said period ending September 8th, 1894, various transactions were had between said Campbell Commission Company and George W. Miller and Son, as a result of which said George W. Miller & Son became indebted to said Campbell Commission Company for two negotiable promissory notes for $5,500.00 each, made by said George W. Miller & Son to said Campbell Commission Company on June 17th, 1894, and also about the same time for another like note for the sum of $5,000.00, made by said George W. Miller & Son to said Campbell Commission Company.

That on September 6th, 1894, said George W. Miller & Son became anxious to buy from one A. H. Pierce a herd of about 5,000 steers in the State of Texas for the purpose of grazing and feeding them on the pastures of the said George W. Miller & Son in the said Indian Territory preparatory to their being marketed in one of said cities, and that it was also the desire of said George W. Miller & Son in making said purchase that said Campbell Commission Company and its assigns should have security for the payment of said three notes, and cause to be procured from the banks of said cities and other cities the necessary loans and advances on the security of said steers to enable George W. Miller and Son to pay in advance installment of the purchase-money and to ship said steers from said State of Texas to their pastures and to graze and feed said steers in their said pastures, and thereupon to ship them to said Campbell Commission Company to one or more of said cities for market, and that when said steers should be marketed said Campbell Commission Company should sell the same for the usual commission on the sale thereof.

Said interpleader further states that as a result of negotiations for the purchase, as aforesaid, by said George W. Miller and Son of said five thousand steers from said A. H. Pierce a contract was accordingly made and executed on the said 8th day of September, 1894, by and between said A. H. Pierce and said Campbell Commission Company; which contract, in words and figures, is as follows, viz:

49 "This agreement made and entered into by and between A. H. Pierce, of Wharton county, Texas, party of the first part, and the Campbell Commission Company, in the live-stock business, doing business at Chicago, St. Louis, Kansas City, Omaha, party of the second part, witnesseth:

That the party of the first part is to have gathered and ready for shipment or about the 25th day of March to the 15th day of April, 1895, all the four-year-old steers and upwards, belonging to himself and J. E. Pierce that can be gathered with reasonable diligence, no stags, cripples, big-jaws or deformities to be included in this contract, and to be such steers of the ages above stated as are common to that portion of Texas; the said party of the first part is to have five thousand steers, more or less, put on board the cars at Pierce Station, Wharton county, Texas, ready for shipment at his own expense as rapidly as a railroad furnishes and handles and places them. The party of the second part hereby agrees to take charge

of said steers at Pierce Station, Texas, upon the delivery on board the cars of said steers, and ship them to their pastures in the Indian Territory at its own risk and pay all freight and other expenses and give all said steers good and sufficient pasture and attention; and further agrees to ship said steers to market during the summer or fall of 1895, for account of the party of the first part.

The proceeds of the sale of said steers are to be applied to the payment of said steers until whole number so delivered shall have been fully paid for at the rate of fifteen dollars per head on board the cars at Pierce Station, Texas.

It is distinctly agreed and understood by the parties hereto *and* that title and ownership of said steers shall be and remain in the party of the first part until the sum of fifteen dollars per head is fully paid by the party of the second part to the party of the first part for each and every steer delivered on board the cars at Pierce Station, Texas, for shipment to the party of the second part.

50 This amount of fifteen dollars per head is to be paid for each steer so delivered, net, to the party of the first part; the freight and all other expenses to be paid by the party of the second part, in addition to the sum of fifteen dollars per head.

It is further agreed and understood by the parties hereto that the party of the first part may put a man with said steers as his agent, in the pastures of the second party, to represent his interests in said steers, said man to be paid fifty dollars per month by the said party of the second part, from the date of shipment of said steers from Pierce Station, Texas, until said steers shall have been shipped to market or fully paid for, and also furnish him horses to ride, and board and lodge him free of cost to the party of the first part during his stay with said steers. Said man to look exclusively after said herd of cattle, and is to obey the instructions of the party of the second part. The sum of five thousand dollars is hereby paid by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part, at the signing of this agreement, as part of the purchase price.

The party of the second part agrees to pay to the party of the first part interest at the rate of ten per cent. per annum on all unpaid amounts from the date of shipment of said cattle from Pierce Station, Texas, until full and final payments are made in accordance with this agreement.

It is further understood and agreed that the party of the second part has a right to select from these above-mentioned steers ten or twelve hundred for the purpose of feeding the same on or before November 1st, 1894, which are to be fed in the Holt pasture in Matagorda county, Texas; and that when they are ready for shipment that party of the second part is to pay to the party of the first part the amount of fifteen dollars per head before they are put on board the cars for shipment.

It is understood that the cattle that are to be delivered for

51 the purpose of feeding are to be branded at the time of delivery with the letter 'C' and that said party of the second

part is to furnish the branding irons, the party of the first part to do the branding.

This contract signed in duplicate this 8th day of September, 1894, at Kansas City, Missouri.

(Signed) CAMPBELL COMMISSION COMPANY,
By JAMES H. CAMPBELL, *Pres.*
(Signed) A. H. PIERCE.

Attest:
(Signed) WM. ALLBRITAIN.
(Signed) HENRY M. WITHERS."

52 Said interpleader further states that said contract, although made in the name of the Campbell Commission Company, was made by it for the benefit of said George W. Miller & Son as the real party for whom and for whose benefit said steers were so purchased and contracted for from said Pierce; that the pastures in the Indian Territory named in said written contract were the pastures leased and owned by the said George W. Miller & Son, and that said contract was made in the name of said Campbell Commission Company to secure it and its assigns, after paying the purchase-money to said Pierce, in the payment of said three notes, in the like payment of the said $5,000.00 named in said contract as part of the purchase-money to said Pierce, which last $5,000.00 was procured to be advanced and paid to said Pierce by said Campbell Commission Company for said George W. Miller & Son, in the payment of such advances as should be procured by said Campbell Commission Company to said George W. Miller & Son for the shipment, grazing, pasturing, and feeding of said steers when they should be finally marketed and to receive the commissions when they should be earned by the sale of said steers by the said Campbell Commission Company.

Said interpleader further states that after the making and execution of said contract as aforesaid said 5,000 steers were by said A. H. Pierce and said George W. Miller & Son jointly shipped at the cost and expense of said George W. Miller & Son from Pierce Station, named and specified in said contract, to the said pastures named in said contract and so belonging to the said George W. Miller & Son, in said Indian Territory, and that from the time of the arrival of said 5,000 steers in said pastures until some time after the attempted levy and service of the attachment and garnishment in this case said 5,000 steers remained and continued in said pastures in the joint possession of the said A. H. Pierce and George W. Miller & Son.

Said interpleader further states that on June 17th, 1894, said Campbell Commission Company obtained from the National
53 Live Stock bank, in Chicago, Illinois, an advance and loan of $10,000 for said George W. Miller & Son, to be used by them in their said business of grazing and feeding cattle, and that to secure the payment to said bank of said last sum said Campbell Commission Company at the same time transferred by its endorse-

ment to said bank said two notes hereinbefore mentioned for $5,500.00 each, and also gave its own note to said bank for $10,000.00 for the same indebtedness, which last note is the one mentioned in the second item of the assignment hereinafter set out at length, and which said two notes for $5,500.00 each, also said note for $10,000.00, have ever since they were so transferred and made to said bank been held and owned by said bank and remain wholly due and unpaid.

Said interpleader further states that at about the time of making and execution of said contract said Campbell Commission Company procured from the Third National Bank of St. Louis, Missouri, an advance and loan of $5,000.00 to enable said George W. Miller and Son to pay to said A. H. Pierce the advance installment of purchase stipulated for in said contract; that said $4,500.00 was used for said purpose, and at the same time said George W. Miller and Son delivered to said Campbell Commission Company their negotiable promissory note for $5,000.00, which at the same time was transferred by endorsement by the said Campbell Commission Company to said last bank to secure the payment of said advance and loan.

That some time in the winter of 1894 and 5 said Campbell Commission Company procured for said George W. Miller & Son from said last bank the further advance and loan of $5,000.00 to enable said George W. Miller & Son to pay the costs of grazing and feeding said 5,000 steers, and at the same time said George W. Miller & Son made to said Campbell Commission Company a negotiable promissory note for said last loan, which said last note was likewise endorsed and delivered to said last bank by said Campbell
54 Commission Company, and that afterwards, on March 11th, 1895, said George W. Miller and Son, in renewal of said two last notes for $5,000 each, gave *its* new note to said last bank for $10,000.00, endorsed by said Campbell Commission Company, and that on April 23rd, 1895, said Campbell Commission Company, to secure said last note of $10,000, gave to said last bank its own note for $10,000.00, which last note is the one mentioned in the first item — the said assignment hereinafter set out, and that said last bank is still the owner and holder of said two last notes for $10,000.00 each, and that the same remain wholly due and unpaid.

Said interpleader further states that some time prior to the making and executing of said contract said Campbell Commission Company advanced to said George W. Miller & Son the sum of $5,000.00 for use in their said grazing and feeding business and took their negotiable promissory note therefor, which is the first $5,000.00 note hereinbefore specified; that when said contract was made and executed it was understood and agreed that said contract so made in the name of said Campbell Commission Company should be security and in behalf of said Campbell Commission Company and its assigns for the payment of said note as stated aforesaid, and that after the making of said contract said Campbell Commission Company borrowed from the Northwestern National Bank of Chicago, Illinois, the sum of $4,500.00 and gave said last-named bank its own note for that sum and at the same time endorsed and transferred as col-

lateral security for said note of $4,500.00 said other last-named note of George W. Miller & Son for $5,000.00, and that neither of said last-mentioned notes have been paid, but the same remains due and wholly unpaid and are still held and owned by said last-named bank, and that said note for $4,500.00 is the note mentioned and described in the third item of the assignment hereinafter set out at length.

Said interpleader further states that on March 11th, 1895, said Campbell Commission Company procured for said George
55 W. Miller & Son, for use by them in the grazing and feeding of said 5,000 steers, from the National Park Bank of New York city the sums and advancements of $3,000.00 and $2,000.00, and at the same time there was given to said last-named bank the notes of said George W. Miller & Son for those amounts, which were endorsed by said Campbell Commission Company; that on March 21st, 1895, said Campbell Commission Company procured from said last-named bank the further advancement for said George W. Miller & Son of $2,000.00 for the same purpose, and at the same time there was delivered to said last-named bank therefor the note of said George W. Miller & Son for said $2,000.00, which was also endorsed by said Campbell Commission Company; that said three notes for $3,000.00, $2,000.00, and $2,000.00 are still owned and held by said last-named bank and are still wholly due and unpaid, and that said three last-named notes are the notes mentioned and described in the fourth item of said assignment hereinafter set out at length.

Said interpleader further states that in obtaining said several sums of money from said several banks it was understood and agreed with each of said banks that in consideration of said advancements that said contract and 5,000 steers and the proceeds to be derived therefrom should, after the payment of said purchase-money to said Pierce, be and continue security for the payment to said banks of said advancements and of said several notes given therefor.

Said interpleader further states that on July 1st, 1895, and before the institution of this suit said Campbell Commission Company made, executed, and delivered to said interpleader an assignment, which was accepted by said interpleader and the parties therein named, in words and figures as follows:

KANSAS CITY, MISSOURI, *July 1st*, 1895.

Whereas the Campbell Commission Company has executed certain promissory notes, as herein described, and has become liable
56 on certain other promissory notes hereinafter described by reason of endorsement and being desirous of securing said indebtedness, they hereby sell and assign all the right, title, and interest in and to a certain contract made and signed and delivered in duplicate on the 8th day of September, 1894, by and between A. H. Pierce, of Wharton county, Texas, and the Campbell Commission Company to T. A. Stoddard, as trustee, of St. Louis, Mo., for the said purpose of securing the following-described paper, to wit:

First. Third National Bank of St. Louis, one note dated April 23rd, 1895, due October 26th, 1895, signed by Campbell Commission Company, $10,000.00.

Second. National Live Stock bank, Chicago, note dated June 17th, due on demand, signed by Campbell Commission Company, $10,000.00.

Third. The Northwestern National bank, Chicago, Ill., on demand note, $4,500.00, signed by Campbell Commission Company.

Fourth. National Park bank, New York city, one note dated March 11th, 1895, due July 14th, 1895, $3,000.00; one note dated March —, 1895, due July 14th, 1895, $2,000.00; one note dated March 21, 1895, $2,000.00, all of the above notes being signed by G. W. Miller & Son, G. W. Miller and J. C. Miller, payable to and endorsed by the Campbell Commission Company.

Which said trustee shall have the rights and privileges granted under said contract for the purpose aforesaid, and shall be empowered to do all acts and things that the said Campbell Commission Company are permitted to do under the said contract and to apply the proceeds derived therefrom to the payment of said notes heretofore described proportionately.

In witness whereof the said corporation has caused these presents to be executed by its proper officer and its corporate seal affixed this 1st day of July, 1895.

(Signed) CAMPBELL COMMISSION COMPANY.
JAMES H. CAMPBELL, *Pres.*
[SEAL.] OTIS F. HALL, *Sec.*

57 Said interpleader further states that the said contract hereinbefore set out was and is the same contract specified in said assignment, and that the said 5,000 steers were the same steers that were sought to be levied on by the attachment and garnishment in this case.

Said interpleader further states that he is informed and he states the facts to be that said Pierce has, since the levy of the attachment and garnishment in this cause, sold said 5,000 steers under said contract, and that he now holds a large sum of money derived from said sale in excess of the balance still due him on account of said contract, which excess is in his hands, subject, as aforesaid, to application on the payments of the debts mentioned in said assignment.

Said interpleader further states that said Campbell Commission Company and all its property were on July 12th, 1895, by the order and decree of the United States circuit court of the western district of Missouri, placed in the hands of receivers, and that in consequence thereof said Campbell Commission Company became and was wholly unable and failed to earn, and that it did not at any time earn, any commission for the sale of said 5,000 head of steers, the right to which commission was the only interest, contingent or otherwise, that the said Campbell Commission Company ever had in or to said contract or in said 5,000 steers, and that said Campbell Commission Company never had any right, title, or interest in said contract or in said 5,000 steers, or in the proceeds derived from the

sale thereof, that were or are subject to attachment and garnishment herein, and interpleader says that neither the pretended levy of the attachment or the service of the garnishment herein were made according to law, but the same and each of them were and are wholly null and void.

The premises considered, said interpleader prays judgment on this his interplea as the owner of said money in the hands of said Pierce, after deducting therefrom the amount thereof so be-
58 longing to said Pierce, that this court will dissolve and dismiss the attachment and garnishment herein and adjudge the costs thereof and of this interplea against the plaintiff in this action, and for such other and further judgment as the facts stated in this interplea and the record in this cause may warrant and justify.

(Signed) BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Interpleader.

STATE OF MISSOURI, } ss:
City of St. Louis, }

The said T. A. Stoddart, being duly sworn, states that he has read the foregoing interplea, and that the matters therein set forth are true, as he verily believes.

(Signed) T. A. STODDART.

Subscribed and sworn to before me this 14th day of October, A. D. 1895.

[SEAL.] (Signed) ART. D. GREEN,
Notary Public.

Term ends July 21, 1899.

Said instrument being endorsed on the back in words and figures as follows:

"# 528. Central Loan & Trust Co. *vs.* Campbell Commission Co. Interplea of T. A. Stoddart, trustee. Botsford, Deatherage & Young, 621, 622, 623 N. Y. Life bldg., Kansas City, Mo. J. H. Havighorst, clerk. Filed October 21st, 1895."

59 Be it remembered that thereafter the following receiver's report was filed in said cause:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff, }
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. }

To the honorable judge of the above-named court:

Pursuant to your order on the 7th day of September, 1895, appointing a receiver for the cattle attached in the above cause, your receiver, A. H. Pierce, took charge of said cattle and receipted to the sheriff of Noble county, Oklahoma, for the same on the 14th day of September, 1895, and proceeded to market and *sell* the same, as shown by the account of sales filed from time to time in the office of your clerk and numbered from 1 to 16, inclusive.

Number cattle delivered under contract Apr. 8, 1895...	5,022 head.
Killed in transit from Pierce Station to Ponca.....	12 head.
Killed by railroad in pasture.....	10 "
Found dead from natural causes in pasture...	32 "
"Big-jaws" given to J. C. Miller for use of horses in handling cattle.....	10 "
Shipped to market.....	4,956 "
Price of one steer held in St. Louis, inspector, upon order of one Scott....	1
	5,021
Unaccounted for..... . .	1

That according to the above statement all the cattle delivered under the Pierce-Campbell Commission Company contrary are accounted for except one steer.

That claims have been filed for the ten head of steers killed by railroad while in pasture and the one steer held out at St. Louis by inspector for one Scott, and as soon as they are heard from will be reported.

60 The court's attention is called to the fact that no railroad fare is charged in the personal-expense account of your receiver or his attorney up to this date, they having been able to travel on cattle contracts while these cattle were moving, and that no interest is charged by him in handling these cattle except the three amounts for pasturage.

Campbell Commission Company or Stoddart, trustee, to A. H. Pierce, Dr.

1895.		
Apr. —.	Delivered to Campbell Commission Company 5,022 cattle, $15.00	$75,330 00
	Balance due on account.....	1,916 75
		77,291 75
	By cash at signing contract	5,000 00
		72,291 00
	Int. from Apr. 8 to Aug. 26, 140 days.....	2,811 00
		75,103 09
Aug. 26.	By sale cattle, 388.....	7,208 60
	Balance..... ...	67,894 49
	Int. to Sep. 18th, 23 days	433 00
	Balance...	68,328 26
Sep. 18.	By sale cattle, 406,400.....	17,225 60
	Balance.....	51,102 00
	Interest to Sep. 21st, 3 days.....	42 58
	Balance.....	51,145 24

Sep. 21. By sale cattle, 405, B 2		9,026 38
Balance		42,118 86
Int. to Sep. 26th, 2 days		23 39
Balance		42,142 25
Sep. 23. By sale cattle, 404		8,697 73
Balance		33,444 52
Int. to Sep. 26th, 3 days		27 87
Balance		33,472 39
Sep. 26. By sale cattle, 407, 405		17,713 58
Balance		15,758 81
Int. to Sep. 27th, 1 day		4 38
Balance		15,763 19
Sep. 27. By sale cattle, 392, 391		17,001 69
		1,238 50

61 *Statement of All Moneys Received from Sale of Cattle by A. H. Pierce, Receiver, and All Moneys Paid Out by said Receiver on Account Cattle as per Instructions of Court.*

Aug. 26. From account sales, 388 cattle			7,208 60
406		$8,855 92	
400		8,369 68	
			17,225 60
405		9,000 46	
2		25 92	
			9,026 38
404		8,000 00	8,697 73
407		8,798 77	
405		8,914 81	
			17,713 58
392		8,470 11	
391		8,513 58	
			17,001 69
390			8,015 75
1			20 37
365		7,746 03	
280		5,648 97	
			13,414 00
314			6,595 86
6			126 00
4,956			105,062 56

EXPENDITURES.

Paid A. H. Pierce balance	$72,291 75	
" " " " interest	3,343 33	
Pasturage and interest	2,474 39	
Expense in tax suit	290 00	
Amount retained as indemnity	3,500 00	
Paid Brown & Harsh grocery bill	111 90	
Paid personal expense of receiver and att'y	161 95	
Paid Bell's expense bills	207 60	
Paid Bell's wages and traveling expenses home	320 00	
	22,361 64	
		$105,062 56
		82,700 92
		22,361 64

62 *Statement of Sale of Cattle, as per Order of Court, after Payment of A. H. Pierce's Claim.*

Sep.	27.	By balance cash on hand			$1,238 50
	28.	Sale cattle, 390			8,015 75
Oct.	1.	" " 1			20 37
	3.	" " 365	7,746 03		
	"	" " 280	5,684 97		
					13,413 00
	"	" " 314			6,595 86
	11.	" " 6			126 00
					$29,427 48
	Less—				
		(Exhibit C):			
Aug.	21.	Paid for pasturage	752 50		
		exchange	1 88		
		interest on same	7 97		
					$762 35
		(Exhibit "B"):			
Aug.	28.	Paid for pasturage	200 00		
		exchange	10		
		interest on same	2 00		
					202 10
		(Exhibit "E"):			
Sep.	16.	Paid for pasturage	1,500 00		
		interest on same	4 94		
					1,509 94
		(Exhibit "F"):			
Aug.	26.	Paid att'y fee in tax suit			275 00

(Exhibit "G"):

Sep.	7.	Paid clerk's cost in filing said suit....	15 00
	7.	Amount retained as indemnity..... ...	3,500 00
			93 24

(Exhibit "H"):

Aug.	31.	Paid Brown & Harsh, grocery bill....	18 66
		Paid personal expense, A. H. Pierce.....	113 90
		Paid personal expense of attorney.....	48 05

(Exhibit "J," 1 to 10, inc.):

Paid Bell's expense bills.....	207 60
Paid Bell's wages, as per contract.....	300 00
Paid Bell's expense, as per contract, back to Tex.....	300 00
	$7,065 84
	$29,427 48
	7,065 84
	$22,361 64

Receiver's allowance .....
Allowance to receiver's attorneys .....
Clerk's costs... ....
Sheriff's costs .....

Balance on hand ... ...

Respectfully submitted.

(Signed) A. H. PIERCE.

HENRY M. WITHERS,
Att'y for Receiver.

63 *List of Bell's Expense Bills.*

Oct.	9.	1. A. C. Bell.	$11 40
	4.	2. G. W. Cook	73 00
Sep.	30.	3. J. G. Hains	1 00
	30.	4. T. T. Bowder...	10 00
Oct.	4.	5. Ben. Sipe...	70 15
Sep.	30.	6. Willie Teafullar.....	7 00
	"	7. J. F. Jewett.....	8 00
	"	8. A. E. Kemp.....	5 00
	"	9. Zack Miller.....	14 00
	"	10. Ira A. Kemp.....	8 05
			$207 60

(Exhibit "J.")

Said receiver's report being endorsed on the back in words and figures as follows: "In the district court of the county of Noble,

Oklahoma Territory. Central Loan & Trust Co., a corporation, plaintiff, *vs.* The Campbell Commission Company, a corporation, defendant. Receiver's report."

64 Be it remembered that thereafter and on the 5th day of November, 1895, plaintiff filed its demurrer to the interplea of T. A. Stoddard in said cause, the same being in words and figures as follows, to wit:

In the District Court of Noble County, Territory of Oklahoma.

CENTRAL LOAN & TRUST COMPANY, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. } Demurrer.

Comes now the plaintiff and demurs to the interplea of T. A. Stoddart, trustee, for the reason that the same does not state facts sufficient to entitle said Stoddart to any relief as against this plaintiff or to any participation in the proceeds of the property attached in this action.

(Signed) HARRIS & LAFFERTY,
Attorneys for Plaintiff.

Said demurrer being endorsed on the back thereof as follows: "# 528. Central L. & T. Co. *vs.* Campbell Com. Co. Demurrer of plaintiff to interplea of T. A. Stoddart, trustee. Filed Nov. 5, 1895. J. H. Havighorst, clerk, by W. C. Glenn, deputy. Harris & Lafferty, att'ys for pl'ff."

65 Be it further remembered that thereafter and on the 11th day of November, 1895, the defendant filed its amended plea to jurisdiction in said cause, the same being in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant. } Amended Plea to Jurisdiction.

Comes now the defendant, The Campbell Commission Company, and, entering its appearance to this cause specially for the purpose of this plea to the jurisdiction of the court and for such purpose only, moves the court to dismiss this cause for want of jurisdiction of the person of this defendant and of the subject-matter of the action for the following specific reasons, to wit:

First. Under the organic act of the Territory the court cannot acquire jurisdiction of the person of this defendant by constructive service by foreign attachment without its consent.

Second. Because no actual service has been had upon this defendant by service of summons within Noble county, as required by law.

Third. Because there has been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process, and reference is hereby made to the answer of A. H. Pierce, garnishee, which said answer discloses the fact that the defendant has and had no interest in the property attempted to be seized and garnished in this couse, and — which said — disclosing such facts said plaintiff never joined issue nor served any notice of taking issue on such answer.

66 Whereby the said answer became — and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service.

Fourth. Because the pretended seizure of said property in void as a basis of jurisdiction, because there was no actual or constructive service of any attachment or garnishment order on this defendant.

Fifth. Because the affidavit for service by publication is wholly insufficient to authorize such service.

Sixth. Because the pretended notice by publication is insufficient, because it does not comply with the law, and because the same was not published as required by law.

Seventh. Because the pretended order of attachment and garnishment are void for the reason that no undertaking was given by the plaintiff therefor, and because the record discloses that the debt sued upon was not due, and all pretended seizures were void under such writs by reason thereof.

Wherefore said defendant prays that any and all pretended or attempted service upon this defendant be quashed for want of jurisdiction, and that said cause be dismissed for the same reason.

(Signed) ASP, SHARTEL & COTTINGHAM,
Att'ys for Defendant.

Endorsed on the back of said instrument are the following words and figures: #528. Central Loan & Trust Company, plaintiff, *vs.* The Campbell Commission Company, defendant. Plea to jurisdiction. Filed Nov. 11, 1895. Jno. H. Havighorst, clerk, by W. C. Glenn, dep.

67 Be it remembered that on November 25th the following interplea was filed in said cause by G. W. and J. C. Miller, to wit:

In the District Court of Noble County, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, Plaintiff, *vs.* THE CAMPBELL COMMISSION COMPANY, Defendant.	Interplea of George W. and J. C. Miller.

And now, on this day, comes George W. Miller and J. C. Miller, by their attorneys, — for their interplea in this cause state—

That at all times hereinafter mentioned these interpleaders,

George W. Miller and J. C. Miller, were partners in business under the firm name and style of George W. Miller & Son.

These interpleaders further state that at Kansas City, Mo., a certain contract and agreement was entered into by and between A. H. Pierce, the receiver herein, and the defendant, The Campbell Commission Company, a corporation, a copy of which said agreement is set forth in the interplea of T. A. Stoddart, trustee, filed in this cause.

These interpleaders further states that said contract and agreement was so made and entered into for the sole use and benefit of George W. Miller & Son by The Campbell Commission Company, defendant herein.

That these interpleaders under the firm name and style of George W. Miller & Son, gave their notes and procured the money for the purpose of purchasing said cattle, making a cash payment thereon of five thousand dollars and paying the freight of said cattle from the pasture of A. H. Pierce, in the State of Texas, to the pasture of these interpleaders, in the Territory of Oklahoma.

That while said contract appears to have been made between A. H. Pierce, party thereto, and The Campbell Commission Com-
68 pany, a corporation, the defendant herein, that in truth and in fact said defendant, The Campbell Commission Company, had no interest whatever in the said cattle, except that the same when sold were to be shipped to the said Campbell Commission Company, and that said Campbell Commission Company should sell the same upon the market and receive as compensation for selling the same fifty (50) cents per head for all of said cattle so sold by the Campbell Commission Company.

A copy of said contract and agreement so made and entered into between said A. H. Pierce and the Campbell Commission Company, as set forth in the interplea of T. A. Stoddart, trustee, filed herein, is hereby referred to, adopted, and made a part hereof as fully as though the same was herein set forth at length.

These interpleaders further state that at no time or place did they or either of them ever assign or authorize the assignment of said cattle contract so made for their benefit for the interpleader herein, T. A. Stoddart, trustee, and if any such an assignment was made as is alleged in the interplea of T. A. Stoddart, herein filed, that said assignment was executed by the Campbell Commission Company without any power, authority, or consent of these interpleaders herein, and that these interpleaders being the only parties in interest in the said contract that said assignment, if made, which these defendants deny, was made without any power or authority on the part of the Campbell Commission Company and without the consent or knowledge of these interpleaders, and that the same is absolutely void and of no effect, because the same is not authorized.

These interpleaders further states that — the said contract so made and entered into between A. H. Pierce and the Campbell Commission Company for the benefit of these interpleaders, these interpleaders became and were the absolute owners of the cattle therein

mentioned and described, subject only to the claim of A. H.
69 Pierce, as shown by said contract; that immediately thereafter these interpleaders brought said cattle to their pasture, in Oklahoma Territory, fed and cared for said cattle, and were in possession thereof at the date of the commencement of this action, and neither the plaintiff nor the interpleader T. A. Stoddart, trustee herein, nor any other person herein had or could lawfully claim any other interest in or lien upon said cattle save and except the claim of said A. H. Pierce, as shown by said contract herein referred to and adopted; that these interpleaders were at the date of the appointment of A. H. Pierce as receiver herein and at the date of the commencement of this action entitled to the possession of said cattle against the lawful claims of all persons whomsoever.

And that the proceeds of said cattle after the payment of the lawful claim of said A. H. Pierce is and at all times has been the property of these interpleaders.

Wherefore the interpleaders pray judgment for the proceeds of said cattle now in the hands of this court after the payment of the claim of A. H. Pierce and the costs of this action, and that these interpleaders may be found justly entitled thereto as against the claims and demands of all others.

(Signed) POLLOCK & LOVE,
Att'ys for Interpleader-.

TERRITORY OF OKLAHOMA, } *ss:*
County of Noble, }

Now, on this date, comes George W. Miller, and, being first duly sworn, states that he has read the above and foregoing interplea, and that all the matters and things therein set forth are true, as he verily believes.

(Signed) GEORGE W. MILLER.

Subscribed and sworn to before me this 25th day of November, 1895.

(Signed) E. F. TEBBE,
Deputy Clerk District Court.

70 Endorsed on the back on the 25th day of November, 1895: Central Loan & Trust Company, plaintiff, *vs.* Campbell Commission Company, defendant. Filed Nov. 25th, 1895. Interplea of Geo. W. and J. C. Miller. J. H. Havighorst, clerk, by E. F. Tebbe, clerk.

Be it remembered that on the 25th day of November, 1895, plaintiff filed in said cause its answer to the interpleas of A. H. Pierce, heretofore filed herein, in words and figures as follows:

In the District Court of Noble County, Territory of Oklahoma.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.

Answer to Interplea of A. H. Pierce.

Comes now the above-named plaintiff, and for answer to the interplea of said A. H. Pierce herein and by leave of court first had and obtained states:

First. That said plaintiff denies each and every allegation, statement, and averment in said interplea contained except as are hereinafter admitted.

Second. Plaintiff admits that said steers have not been taken upon any mesne or final process issued against said A. H. Pierce.

Third. For further answer plaintiff says that said interpleader has waived and abandoned all his interest and claim in and to said property excepting by virtue of his office as receiver in said action, as shown by the records and proceedings in this cause in relation to the appointment of said A. H. Pierce as receiver and his
71 acceptance of said trust, special reference to which records and proceedings is hereby made and the same made a part of this answer.

(Signed) HARRIS & LAFFERTY,
Att'ys for Plaintiff.

Said instrument being endorsed on the back in the following words and figures, to wit:

"528. Central Loan & Trust Co. *vs.* Campbell Commission Co. Answer to interplea of A. H. Pierce. Filed Nov. 25th, 1895. J. H. Havighorst, clerk of dist. court."

72 Be it remembered that thereafter and on the 11th day of December, 1895, A. H. Pierce filed a motion for allowance to receiver and attorney in the following words and figures:

In the District Court of Noble County, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, Corporation, Plaintiff,
vs.
CAMPBELL COMMISSION COMPANY, Corporation, Defendant; A. H. Pierce, Interpleader and Garnishee; T. A. Stoddart, Trustee, Interpleader; A. H. Pierce, Receiver.

Your petitioner, receiver herein, with due respect shows that your petitioner under order appointing receiver of property attached in above-entitled action (some five thousand head of cattle, more or less) took charge of said cattle in the pasture in the Ponca reservation, Indian Territory, and proceeded at once to put them in market and convert the same into money.

That the first shipment of cattle was made on or about the 26th day of August, 1895, and from time to time other shipments were

made until about the 11th day of October, when the last of said cattle were disposed of.

That he has already received from the sale of said cattle the sum of $105,062.56, from which are to be deducted large sums of indebtedness arising under contract of sale of said cattle from A. H. Pierce to the Campbell Commission Company, made Sep. 8th, 1895; a full statement of all of which is made by your petitioner in his full report as receiver and now on file in this court and to which your honor's attention is specially called.

73 That there is in the hands of your petitioner, as shown by said statement, a large sum of money, and held pursuant to your honor's orders herein by your petitioner subject to the final adjudication of the claims presented by attaching and intervening claimants and the order of distribution by this hon. court.

That during the time your petitioner had charge of those cattle and the conversion of the same into money and in order to obtain the best prices for them it became his duty — and — did pay close attention to the markets and did from the best sources from time to time get probable supply and demand in the markets, and — shipping said cattle thereto he exercised a judgment in this behalf acquired from forty years' experience in the handling and marketing of cattle.

That your petition- gave his personal attention to the handling and loading on cars of said cattle, and in many instances followed them to market and personally attended to the handling and sale of same in market in order to get the best prices.

That your petitioner had to spend a good deal of time and was subjected to considerable annoyance and expense in making a bond in order to protect said property in his charge and to avert the collection of a tax levied upon cattle while in the Territory, as to the collection thereof he was advised and believed to be unjust and illegal.

Your petitioner avers that for the judgment as a result of long experience, responsibility, and the active personal supervision in the handling of said cattle a fair and just allowance should be made by this honorable court for the services rendered as receiver.

Your petitioner suggests that the sum of five thousand dollars is a reasonable and just allowance for the services so rendered.

Your petitioner further avers that from his knowledge of the conflicting interest and the possible and even probable litigation to grow out of the attachment of said cattle and to guard against

74 any entanglements he found it necessary to employ a lawyer to keep him clear of any litigation and to look after the accounts and matters in court for the receiver. He did retain one Henry M. Withers, att'y, for that purpose, who looked after the matters from beginning to end.

That his services were well worth five thousand dollars.

Wherefore your petitioner prays that your honor may issue an order allowing your petitioner a just and reasonable allowance for

his services as receiver, and that also an order may be made allowing reasonable and just attorneys' fees to his attorney.

(Signed) A. H. PIERCE,
By HENRY M. WITHERS, *Solicitor.*

Endorsed on the back as follows in words and figures:
In the dist. court of Noble county, Ok. Ter. Central Loan and Trust Co., a corporation, plaintiff, *vs.* Campbell Com. Co., def; A. H. Pierce, interpleader; T. A. Stoddart, trustee, interpleader; A. H. Pierce, receiver. Petition in nature of motion for allowance to receiver and att'y. Filed Dec. 11, '95. J. H. Havighorst, clerk. E. F. Tebbe, dept.

75 Be it further remembered that thereafter and on the 16th day of December, 1895, the defendant filed its amended plea to jurisdiction in said cause, the same being in words and figures as follows:

In the District Court of the County of Noble, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.
} Amended Plea to Jurisdiction.

Comes now the defendant, The Campbell Commission Company, and entering its appearance to this cause specially for the purpose of this plea to the jurisdiction of the court, and for such purposes only, moves the court to dismiss this cause for want of jurisdiction of the person of this defendant and of the subject-matter of the action for the following specific reasons, to wit:

First. Under the organic act of the Territory the court cannot acquire jurisdiction of the person of this defendant by constructive service by foreign attachment without its consent.

Second. *Second.* Because there is no basis for service by publication herein for the reason that all the attachment proceedings are void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due.

Third. Because there has been no seizure of any of defendant's property within the jurisdiction of this court either by attachment or garnishment process, and reference is hereby made to the answer of A. H. Pierce, garnishee; which said answer discloses the fact that the defendant has and had no interest in the property attempted to be seized and garnisheed in this cause, and —

76 which said — disclosing such facts said plaintiff never joined issue nor served any notice of taking issue on such answer.

Whereby the said answer became and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service.

Fourth. Because the pretended seizure of said property is void as

a basis of jurisdiction because there was no actual or constructive service of any attachment or garnishment order on this defendant.

Fifth. Because the affidavit for service by publication is wholly insufficient to authorize such service.

Sixth. Because the pretended notice by publication is insufficient because it does not comply with the law and because the same was not published as required by law.

Seventh. Because the pretended order of attachment and garnishment are void for the reason that no undertaking was given by the plaintiff therefor and because the record discloses that the debt sued upon was not due and all pretended seizures were void under such writs by reason thereof.

Wherefore said defendant prays that any and all pretended or attempted service upon this defendant be quashed for want of jurisdiction, and that said cause be dismissed for the same reason.

(Signed) ASP, SHARTEL & COTTINGHAM,
Att'ys for Defendant.

Endorsed on the back of said instrument are the following words and figures: "528. Central Loan & Trust Company, plaintiff, *vs.* The Campbell Commission Company, defendant. Plea to jurisdiction. Filed Dec. 16th, 1895. Jno. H. Havighorst, clerk, by W. C. Glenn, dep."

77 Be it further remembered that upon the hearing of the said above and foregoing amended plea to jurisdiction the defendant introduced all the pleadings, motions, orders, files, records, and proceedings theretofore had in said cause in evidence, and asked that same be considered in determining whether or not said amended plea should be sustained.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant.

Now, on this 16th day of December, 1895, said cause coming on to be heard on the plea of said defendant, The Campbell Commission Company, to the jurisdiction of the court, and the plaintiff appearing by Messrs. Harris & Lafferty, its attorneys, and the defendant appearing specially by Messrs. Asp, Shartel & Cottingham, its attorneys, *and* thereupon the plaintiff objected to the consideration of said motion because the same is filed after the time specified in the publication notice for answer, and that said defendant denied any interest in the attached property, and that said motion is not sufficient in form and substance to raise any question for the consideration of this court; which objection is by the court overruled; to which ruling the plaintiff duly excepted, and thereupon the defendant by leave of court filed an amended plea to the jurisdiction by adding and substituting the following ground, to wit:

"Second. Because there is no basis for service by publication herein, for the reason that all the attachment proceedings are void

for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due;" and thereupon
the said plea and motion was duly argued by counsel for the
78 parties, and the court, being fully advised in the premises,
overrules the said motion upon the following grounds stated in said amended motion, to wit, first, third, fourth, fifth, sixth, and seventh; to which said ruling of the court overruling the said motion upon the said grounds stated in the said amended plea to the jurisdiction the said defendant duly excepted and excepts.

And the court, after hearing the argument of the counsel and being further duly advised in the premises, sustains said motion and plea upon the second ground stated in said amended motion and plea, to wit, "Because there is no basis for service by publication herein for the reason that all the attachment proceedings are void for want of power of the probate judge to grant the attachment on the plaintiff's demand before the same was due"—

The court holding as a matter of law that the act of the Territorial Assembly of the Territory of Oklahoma attempting to confer power upon the probate judge to grant attachments upon debts before due upon absence of the district judge from said county is unconstitutional and void.

And it is therefore by the court considered, ordered, and adjudged that the said plea to the jurisdiction be, and the same is hereby, sustained upon the second ground therein stated as aforesaid and is overruled on each and all of the other grounds stated in said plea; to which ruling overruling said plea to the jurisdiction of the court in part the said defendant duly excepted and excepts, and to which said ruling sustaining said plea to the jurisdiction upon the second ground the said plaintiff duly excepted and excepts.

It is therefore by the court considered, ordered, and adjudged that the attachment proceedings in this matter are null and void and of no effect, and that the same are hereby discharged, vacated, and held for naught; to which the said plaintiff duly excepted and excepts.

79 And it is further considered, ordered, and adjudged that by reason of the nullity of the said attachment proceedings the attempted service by publication in this matter upon the defendant, The Campbell Commission Company, is null and void and of no effect, and that the court has no jurisdiction to hear and determine this cause; to which the plaintiff duly excepted and excepts.

And it is therefore by the court considered, ordered, and adjudged that this action be, and the same is hereby, dismissed for want of jurisdiction without prejudice as to the defendant, The Campbell Commission Company, and that the plaintiff pay the cost in this action, taxed at $—.

Hereof let execution issue; to which said order vacating and discharging said attachment the said plaintiff duly excepted and excepts, and to which said order dismissing said cause at the cost of said plaintiff for want of jurisdiction the said plaintiff also duly excepted and excepts.

Thereupon the said plaintiff requests the court to fix a time

within which it may file its petition in error for the supreme court of Oklahoma Territory for the purpose of reviewing said order discharging and vacating the said attachment, and the court fixes the time at thirty days from this date, to wit, the 15th day of January, A. D. 1895. The court also, at the request of the plaintiff to fix the amount of the bond of the said plaintiff for stay of execution upon said order of dismissal, fixes the same at the sum of five hundred dollars, to be executed with good and sufficient securities and to be approved by the clerk, conditioned as required by law; and it is ordered that execution be staid without bond.

And the plaintiff at its request is given fifteen days in which to make and serve a case-made for review in the supreme court of Oklahoma Territory and the defendant is given five days
80 thereafter to suggest amendments, and which said case-made may be signed and settled on two days' notice.

(Signed) A. G. C. BIERER, *Judge.*

O K.
HARRIS & LAFFERTY.
ASP, SHARTEL & COTTINGHAM.

Endorsed on the back in words and figures as follows:
"Central Loan & Trust Company *vs.* Campbell Commission Company. Filed Dec. 16, '96. J. H. Havighorst, clerk, by W. C. Glenn, deputy."

81 In the District Court of Noble County, Oklahoma Territory.

CENTRAL LOAN & TRUST COMPANY, Plaintiff,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant. } Certificate.

TERRITORY OF OKLAHOMA, }
Noble County, } *ss:*

I, J. H. Havighorst, clerk of the district court of Noble county, Oklahoma Territory, do hereby certify that the above and foregoing transcript of record in the case of The Central Loan & Trust Company, plaintiff, *vs.* The Campbell Commission Company, defendant, contains a full, true, and complete transcript of the record in said cause, and contains full, true, and complete copies of all the pleadings, motions, orders, judgments, reports, writs, process, journal entries, and proceedings of every kind and nature had, done, and performed, filed or entered in the above-entitled cause as the same now appears of record and now on file in my office.

In testimony of which witness my hand and the seal of said court at my office, in the city of Perry, county of Noble, and Territory of Oklahoma, this 28th day of December, A. D. 1895.

[SEAL.] JNO. H. HAVIGHORST,
Clerk of the District Court, Noble County, Oklahoma Ter.

82 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

We, the undersigned attorneys for the defendant, The Campbell Commission Company, in the foregoing suit, acknowledge that the above and foregoing case-made was duly served on us this 30th day of December, 1895.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Campbell Commission Company.

We find this case-made to be correct, as all suggestions of amendments have been complied with, and we consent that the same may be presented without further notice at any time.

ASP, SHARTEL & COTTINGHAM,
Att'ys for Def't, Campbell Commission Company.

83 TERRITORY OF OKLAHOMA, } ss:
County of Noble, }

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth, is true and correct and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings, and judgments had in said cause; and I hereby settle, allow, certify, and sign the same as true and correct, and hereby order that the clerk of the district court of the county of Noble attest the same with the seal of said court and sign the same as clerk thereof and file the same of record, as provided for by law.

Witness my hand, at the city of Perry, this 13th day of January, 1896.

A. G. C. BIERER,
[SEAL.] *Judge of District Court of Noble County.*

Attest: JNO. H. HAVIGHORST,
Clerk of the District Court of Noble County.

Said case-made endorsed: Filed January 13th, '96. J. H. Havighorst, clerk, by E. F. Tebbe, deputy. Filed January 13th, 1896. Edgar W. Jones, clerk supreme court.

84 THE CENTRAL LOAN & TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error. } # 419.

And now, to wit, on this the sixth day of June, A. D. 1896, the above cause was argued and submitted.

85 THE CENTRAL LOAN & TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error. } # 419.

And now, to wit, on this the 12th day of February, A. D. 1897, the above cause having come on for decision, and the court being fully advised in the premises, it is therefore considered, ordered, and adjudged that the judgment of the court below be, and the same is hereby, affirmed with costs to above appellant.

Opinion by Tarsney, J., the other judges concurring, except Bierer, J., who tried the cause below, and Keaton, J., who was of counsel, not sitting.

86 In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN & TRUST CO.
vs.
THE CAMPBELL COMMISSION CO.

Attachment—Order of probate judge.—Under the provisions of sections 4120 and 4121 of the Code, Laws of 1893, a judge of probate is authorized to grant an attachment in a cause pending in the district court where it — made to appear that the judge of said district court is absent from the county at the time of granting such attachment, and where a proper showing is made authorizing an attachment under said sections, and said sections are not invalid, as being in conflict with the organic act of this Territory.

Attachment—Jurisdiction—Service.—It is indispensable to give a court jurisdiction in attachment proceedings that there should be personal service of the summons in the action upon the defendant, or that the order of attachment be levied upon property of the defendant, or that an order of garnishment should be served upon a garnishee having property in his possession belonging to the defendant or who is indebted to such defendant. Where there has been no personal service in an action and no property of the defendant seized under an attachment and no property or credits belonging to the defendant reached by an order of garnishment, the court has acquired no jurisdiction; there being neither a service upon the defendant nor any seizure of his property, there is nothing for the jurisdiction to rest upon, and any proceedings taken in the cause are *coram non judice* and void and the cause must be dismissed.

Error from the district court of Noble county.

Harris & Lafferty, William L. Williams, and J. R. Keaton, for plaintiff in error; Asp, Shartel & Cottingham, for defendant in error.

Statement of Case.

On July 2, 1895, plaintiff in error commenced an action in the district court of Noble county on a certain promissory note given by defendant in error on September 1, 1894, due two years after date, for the sum of fifteen thousand dollars, with interest at 8 %; which note had been duly transferred to plaintiff in error in the usual course of business. The note, at the commencement of the action, had not become due. Plaintiff asked judgment in
87 accordance with the terms of the note, and that an attachment issue against the property of the defendant in error on the grounds that the defendant in error was a foreign corporation and was then about to sell and convey its property with the fraudulent intent to hinder and delay its creditors. The judge of the district court in which said action was commenced being absent from the county, an application was made in due form to the judge of the probate court of said county for an order of attachment in said action. Such application was granted by said probate judge and an order of attachment was thereupon issued by said judge to the clerk of the district court of said county, and said clerk issued said attachment and delivered the same to the sheriff of the county for service. At the time of filing the action a summons was issued to the defendant, which was on July 12, 1895, returned "not found." On July 3, 1895, the attachment was levied upon about five thousand head of steers, as the property of defendant, which were appraised at $25.00 per head. On July 29, 1895, an affidavit of service by publication was filed in the action, and publication was made, notifying defendant to appear and answer on or before September 2, 1895. On July 6, 1895, a garnishment summons was issued in said action and served upon one A. H. Pierce. On August 26, 1895, Pierce answered said garnishment and filed an interplea in the action, claiming the attached property under a vendor's lien, and filed a motion to discharge the attachment. The answer of the garnishee showed that he was in the possession of the cattle as vendor of the same, under a vendor's lien, by virtue of a written contract of sale from him to said defendant, by which he reserved title to said cattle until the terms of said contract should be complied with by the defendant; that at the time of the service of the said garnishment the defendant was owing him the sum of about $75,000 upon said contract; that prior to the levy of the attachment and the service of the garnishment order the defendant had parted with all his interest in and to the property and had sold the same to one Stoddard, as trustee, to secure the payment of a number of promis-
88 sory notes for about the sum of thirty thousand dollars, due and payable to various banks, and that at the time of the service of said order of garnishment defendant had no interest in said cattle, but that all the interest that said defendant had ever had therein was then owned by said Stoddard. Said garnishee further answered that at the date of the service of said garnishment nor at any time was he indebted to the defendant in any amount what-

ever, nor did he have any money, property, or effects in his hands or under his control belonging to said defendant or in which defendant had any interest. No answer was filed to this return of the garnishee or any denial made thereof by the plaintiff in error or any issue made thereon; but an order was made in said cause requiring said Stoddard to interplead in the action, and also ordering that George W. Miller and J. C. Miller be made parties thereto, and that they interplead therein; that thereafter the said Stoddard and the said Miller and Miller filed their interpleas in said cause, the interplea of said Miller and Miller reciting the said contract for the sale of said cattle between said Pierce and the defendant, and that said contract was made and entered into by defendant for the sole use and benefit of said Miller and Miller; that the said defendant had no interest whatever in said contract or said cattle, except that the same when sold were to be shipped to said defendant to be sold upon the market by it as a commission company for a commission of fifty cents per head; that all of said property was the absolute property of the said Miller and Miller, subject only to the claim of said Pierce under said contract. On September 7, 1895, an order was made in said cause, by consent of the plaintiff and of said Pierce, appointing Pierce receiver, without bond, to market the cattle on the open market, to pay himself out of the proceeds, and to hold the balance subject to the order of the court. Pierce qualified as receiver and proceeded to market the property and filed his report in the case. The report showed sales amounting to $105,062.56, and that after paying expenses and the
89 amount due the receiver on his claim there was a balance remaining in his hands of $22,361.64. On November 11, 1895, the defendant in error filed a plea to the jurisdiction of the court on the following grounds: Second, "because no actual service has been had upon this defendant by service of summons within Noble county, as required by law;" third, "because there has been no seizure of any of defendant's property within the jurisdiction of this court, either by attachment or garnishment process;" and, fourth, "because the pretended seizure of such property is void as a basis of jurisdiction, because there was no actual or constructive service of any attachment or garnishment order on this defendant." On December 16, 1895, an amended plea to the jurisdiction was filed by defendant in error, in which the following additional grounds was stated: "Because there is no basis for service by publication herein for the reason that all the attachment proceedings were void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due." On the same day the court sustained the plea to the jurisdiction on the additional ground stated in said amended plea and overruled it on each of the other grounds stated and dismissed the cause for want of jurisdiction. The plaintiff in error excepted to the ruling of the court sustaining the motion, and the defendant in error also excepted to the ruling denying the motion upon the other grounds enumerated therein, and the cause is here upon petition and cross-petition in error for decision upon the ruling of the court upon the entire motion.

TARSNEY, *J.*:

Two questions are presented by this record: First, Was the court below without jurisdiction, and were its proceedings void on account of the order of attachment having been granted by the probate judge? and, second, If the probate judge had jurisdiction to order the attachment to issue, had the district court acquired jurisdiction to hear and determine the cause under the proceedings had therein prior to the order of dismissal? Sections 4120 and 4121, Statutes of 1893, relating to civil procedure, are as follows:

90 "SECTION 4120. Where a debtor has sold, conveyed or otherwise disposed of his property with the fraudulent intent to chear or defraud his creditors, or to hinder or delay the collection of their debts or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent or is about to remove his property or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors or of hindering them or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the same debtor."

"SECTION 4121. The attachment authorized in the last section may be granted by the court in which the action is brought or by the judge thereof or in his absence from the county by the probate judge of the county in which the action is brought; but, before such action shall be brought or such attachment shall be granted, the plaintiff or his agent or attorney shall make an oath in writing showing the nature and amount of the plaintiff's claim that it is just, when the same will become due, and the existence of some on-of the grounds for an attachment enumerated in the preceding section."

The contention of the defendant in error upon the first proposition involved in this case is that under the organic law the legislature of the Territory has no power to devolve the functions of the district court on any other person or tribunal than the regularly appointed judge of said court, and that the above act of the legislature, wherein it attempts to confer authority upon the judge of the probate court to grant attachments, is unconstitutional and void; that the powers and functions of a probate court or of the judge thereof are, under the organic act, confined to probate matters, and that authority cannot be conferred upon them by the legislature in matters other than matters of probate.

When courts are called upon to declare an act of the legislature unconstitutional and therefore void the authority of the legislature ought not to be a matter of doubt, but the want of such authority should clearly appear and no act should be declared unconstitutional unless the court so declaring can say that its infringement of the superior law is clear beyond reasonable doubt. Every presumption is in favor of the validity of a law regularly enacted by the law-making power. The provision of the organic act of this Territory vesting its judicial power is as follows:

"That the judicial power of said Territory shall be vested
91 in a supreme court, district courts, probate courts and justices of the peace. * * * The jurisdiction of the several courts herein provided for both appellate and original, and that of the probate court and of the justices of the peace, shall be as limited by law; provided, that justices of the peace who shall be elected in such manner as the Legislative Assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district court- respectively, shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory, affecting persons or property. * * * The said supreme and district courts of said Territory and the respective judges thereof shall and may grant writs of mandamus and *habeas corpus* in all cases authorized by law."

This act nowhere in express words defines or limits the extent of judicial power vested in probate courts nor the nature of the judicial power vested in them. By it chancery and common-law jurisdiction is expressly declared to be possessed by the supreme and district courts and authority for the redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons and property and the granting of writs of mandamus and *habeas corpus* in all cases authorized by law. The question in this case is not whether the act in controversy is inconsistent with the clauses of the organic act which confers upon the supreme court and district courts general jurisdiction in chancery, as well as common law, or whether the legislature could evade or obstruct the exercise of the powers or general jurisdiction of those courts by conferring precisely the same jurisdiction upon judges or probate. The jurisdiction which the act in question authorizes the judge of probate to exercise is not one that is inherent in any court nor is it included in the jurisdiction of courts of general jurisdiction by virtue of their possessing chancery, as well as common-law jurisdiction. Its validity cannot be maintained on the grounds that it is an exercise of chancery or common-law jurisdiction, which is exclusively conferred upon other courts, nor that its exercise belongs of right to courts of general jurisdiction. Conceding that the power conferred by this act upon the probate judge is the power to exercise a judicial function, then two plain propositions presents themselves
92 in this case, viz., can a probate judge receive other judicial powers than those relating to probate matters; and, if so, can judicial functions, as to cases pending in the district court, be granted to any person other than the duly appointed judge thereof? Under the provisions of the organic act already recited that the jurisdiction of the several courts therein provided for "shall be as limited by law" and containing a provision "that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," it could not successfully be maintained that the phrase "as lim-

ited by law" would have the effect to wholly exclude laws made by the legislature of the Territory, or that such legislature did not have authority for conferring new rights or creating new remedies or establishing anomalous proceedings, or that they might not direct in what court or by what officer the powers to enforce such rights, remedies, or proceedings might be exercised. The power to issue attachments is not derived from the common law and never was a part of the jurisdiction exercised by courts of chancery. It is purely of statutory authority and origin. (Jaffrey *vs.* Jennings, 101 Mich., 315; Jaffrey *vs.* Wolf & Son, 1 Okla., 312; Drake on Attachment, sec. 1 *et seq.*)

This court has held that the power to regulate matters of divorce is a legislative one, and that the conferring of jurisdiction upon probate courts to grant divorces was not a wrongful exercise of the right granted by the organic act to the legislature of this Territory to legislate upon "rightful subjects of legislation;" that it was not an infringement on any of the common-law or equity jurisdiction of the supreme or district courts, and that there was no legal reason why the legislature might not enact and repeal laws relating to divorce (Irwin *vs.* Irwin, 3 Okla., 186). The effect of this decision is that the power being in the legislature to enact the law and create the right, it might determine what tribunal should be vested with the power to determine the right; provided, of course, that such tribunal was, by the organic act, a repository of judi-
93 cial power.

The identical question involved herein was before the supreme court of Kansas in a number of cases, and the validity of acts identical with the one we are construing was by that court upheld. The constitution of Kansas, art. 3, sec. 8, provides:

"There shall be a probate court in each county which shall be a court of record, and have such probate jurisdiction, and care of estates of deceased persons, minors and persons of unsound minds as may be prescribed by law, and shall have jurisdiction in cases of *habeas corpus*."

And art. 3, sec. 1, of said constitution provides:

"The judicial power of the State shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court, as may be provided by law."

These provisions are more definite and certainly as restrictive in determining the jurisdiction of probate courts as the provisions of our organic act; yet in a case where the judge of probate made an order appointing a receiver in proceedings in aid of an execution, issued out of the district court under a statute of that State authorizing such proceedings, the statute authorizing judges of probate to make such orders was held valid. (Young *vs.* Ledrick, 14 Kan., 78.)

An act providing that actual settlers upon school land who had settled thereon prior to a certain date and who had made improvements thereon might purchase the same at the appraised value thereof, and providing that the probate judge should have jurisdiction to hear and determine all questions necessary to be determined

in order to ascertain whether the applicant was entitled to purchase said lands thereunder, was held to be valid (*In re* Johnson, 12 Kan., 85). In that case Judge Valentine said:

"It is claimed that said sections are unconstitutional, because the jurisdiction they attempt to confer upon the probate court is not probate jurisdiction, nor any jurisdiction authorized to be conferred upon probate courts by the constitution. There is no prohibition in the constitution or elsewhere against the exercise of such jurisdiction by the probate court. There is no inconsistency between the exercise of this jurisdiction and the performance of any other duty that may rightfully be conferred upon probate courts."

A statute identical in language with ours and from which ours appears to have been copied has been in force in Kansas
94 since 1883, and its validity maintained by the courts of that State (Buck *vs.* Pennybaker, 32 Kan., 467). In that case, in an action in the district court, an order of attachment was issued by the probate judge of Osage county. Afterwards the defendants made a motion before the district judge of said county to dissolve the attachment, and the attachment was set aside and discharged. On appeal the judgment below was affirmed on the ground that it did not appear from the record that the plaintiffs were entitled to the attachment on the grounds stated in their affidavit therefor, and in that case Chief Justice Horton, after quoting the statute, says:

"From these provisions of the statute it is clear that a probate judge can only grant an order of attachment when the district judge is absent from the county, upon the grounds mentioned in said section 230."

In Young *vs.* Ledrick, 14 Kan., 78, *supra*, Brewer, judge, says:

"Can a probate judge be invested with judicial function as to cases pending in the district court? This really separates itself into two questions: Can a probate judge receive other judicial powers than those granted by the constitution to the probate court, and can judicial functions, as to cases pending in the district court, be granted to any person other than the duly elected judge thereof? The first question is no longer an open one in this court, but has been already answered in the affirmative. *In re* Johnson, 12 Kan., 102, and cases cited in the opinion. The second question must also be answered in the affirmative. The jurisdiction of the district court is not defined by the constitution. It is left to the legislature to prescribe its limits and the manner of its exercise. While it may be that, under section 5 of art. 3 of the constitution, it is impossible for the legislature to provide for more than one judge of the district court, and while it may be that no legislation could be upheld which excluded such single judge from a supervisory control of all the proceedings of that court, yet, within this limit, we think it competent for the legislature to provide that other persons may exercise some judicial functions in cases pending therein."

In Nebraska a statute which provides that an attachment may be granted by the court in which the action is brought or by a judge thereof or by the probate judge of the county is held valid (Reed

vs. Bagley, 24 Neb., 332). The case of Ferris *vs.* Higley, 20 Wall., 375, is not in conflict with the views herein expressed. An act of the legislature of Utah Territory provided that—

"The several probate courts in their respective counties have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment. They shall be governed in all respects by
95 the same general rules and regulations as regards practice as the district courts."

Mr. Justice Miller, speaking for the court, declared this act to be unconstitutional, but the broad distinction between that act and the one we are considering is readily apparent. The judicial power which it sought to confer on probate courts was not that arising upon a legislative cause of action or legislative remedial procedure, which the legislature might have entirely dispensed with or might have conferred upon a mere ministerial officer, but that act attempted to confer upon the probate court full concurrent jurisdiction with the district court in all matters, civil and criminal, as well in chancery as at common law. This the court rightly held they could not do, and while the learned judge in the opinion uses language from which it has been argued that the court intended to hold that in Utah, under an organic act identical with ours, the jurisdiction of probate courts was confined exclusively to matters of probate, and that their jurisdiction could not be enlarged by legislative enactment, we think his language, carefully read, will bear no such interpretation, but that the true interpretation thereof makes it to mean that Congress, in conferring on supreme and district courts powers of general jurisdiction in civil and criminal cases, specifically vesting in them common-law and chancery jurisdiction, did not intend to leave it to the territorial legislature to confer a general jurisdiction upon probate courts or to vest them with the essential nature or jurisdiction of the supreme and district courts or to authorize the legislature to modify in essential particulars the constitution or jurisdiction of those courts, but it was not intended in that case to hold that the legislative power was so restricted that they might not confer jurisdiction upon the probate courts or the judges thereof in matters which did not impair the essential nature or jurisdiction of the supreme or district courts or relate to common-law or chancery jurisdiction, for in the opinion the learned judge says:

"We are not prepared to say that in deciding what law is
96 meant in this phrase 'as limited by law' we are wholly to exclude laws made by the legislature of the Territory. There may be cases when the legislature, conferring new rights or new remedies or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had; nor are we called on to deny that the functions and powers of the probate court may be more specifically defined by territorial statutes within the limits of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed upon them by the legislature."

We think the decision in this case when rightly read and inter-

preted sustains the principle of the authorities we have before cited, and that there is nothing therein which negatives the authority of the legislature to confer upon judges of probate the functions sought to be conferred by the act, the validity of which we are considering.

In Clayton *vs.* Utah Territory, 132 U. S., the court clearly defined what was intended to be decided in Ferris *vs.* Higley, *supra;* in commenting upon that case it says:

"While there was no definition of the powers of probate courts in the organic act, this court held that the essential nature of probate courts was not such as to justify the conclusion that they were intended to exercise such powers (those of a general nature in civil and criminal cases), and especially it was held that it was not competent for the legislature to create other courts or vest in other courts created by the organic act powers which had already been vested in the supreme and district courts of the Territory, and that therefore the statute of the Territory conferring common-law and equity jurisdiction on the probate courts was void, as being in conflict with that provision of the act of Congress."

Had the legislature, in the exercise of its authority to legislate "on all rightful subjects of legislation," seen fit to confer upon judges of probate the power to issue marriage licenses, to solemnize marriages, to organize corporations, to hear and determine contested election cases, to take depositions in any case in any court, or acts of a similar character, we would not be warranted in holding that the conferring of such powers would infringe upon the general jurisdiction of the supreme or district courts or modify in any essential particular the constitution or jurisdiction of those courts, and such powers are not in their nature distinguishable from that which we are considering. We are clearly of the opinion that the legislature had the authority to provide that in the absence
97 from the county of the district judge the probate judge might, upon a proper showing, make an order for the allowance of the writ of attachment in an action pending in the district court upon a debt not then due, and that section 4121, *supra*, is not unconstitutional.

The conclusion we have reached on this point necessitates our consideration of the other proposition presented in defendant in error's special plea to the jurisdiction of the district court, viz., that said court had no jurisdiction because no actual service had been had upon the defendant and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process. The record shows that there was no personal service on defendant. The answer of the garnishee showed that the property seized under the writ of attachment issued was in the possession of the garnishee and held by him under a vendor's lien; that by the terms of the contract creating such lien title to the property was not to pass to the defendant, but was to remain in the garnishee until the terms of said contract had been complied with by the defendant; that defendant at the time of the service of the garnishment had no interest whatever in said property, having transferred and assigned whatever interest he

might have had by virtue of said contract to one Stoddard in trust and to be applied in the payment of certain of his debts, amounting to more than any interest which he might have had in said property. Section 4085, Statutes of Oklahoma 1893, provides:

"The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in writing that he elects to take issue on his answer; in which case the issue shall stand for trial as civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto."

No notice having been given to the garnishee by the plaintiff of his intention to take issue on the garnishee's answer in this cause filed and no issue having been made thereon under the foregoing provision of the statute, such answer must be taken as con-
98 clusive of the truth of all the facts stated therein, and such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached, and that no debts or liabilities were owing to him by such garnishees, and that whatever interest he might have had in such property had before the garnishment been lawfully assigned and conveyed to Stoddard. Was there, then, any constructive service against the defendant in the cause by attachment or garnishment? A garnishment to have any force or effect must reach and bind some property of the defendant or some debt due to him. Where property is sold and delivered upon condition that the title shall not vest in the vendee unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until the performance of the condition. Drake on Attachment, section 246; Buckmaster *vs.* Smith, 22 Vt., 203; McFarland *vs.* Farmer, 42 N. H., 386; 19 Federal Reporter, 760; Lucas *v.* Birdsey, 41 Conn., 357; Bradshaw *vs.* Warner, 54 Ind., 58; Freeman on Judgments, sec. 124; Strong *v.* Taylor, 15 N. Y. (Hill), 325; Sage *v.* Sleutz, 23 Ohio St., 1; Cardinal *v.* Edwards, 5 Nev., 40; Harkness *v.* Russell, 118 U. S., 671.

Where completion of a contract is a condition precedent to payment, the payor is not garnishable on his debt before the contract is completed. Carley *v.* Bertran, garnishee, 34 N. W., 674. An answer showing that the debtor has assigned to a third party his interest in the property or in the debt due from the garnishee, and has notified the garnishee, sets up a state of facts showing that the garnishee is under no legal liability to the debtor. (Bailey *vs.* Union Pacific R'y Co., garnishee, 17 N. W., 567.)

The contention of plaintiff in error that defendant in error's plea to the jurisdiction in the court below was a general appearance of defendant in the action and gave jurisdiction cannot be sustained. In order to constitute a general appearance the de-
99 fendant must file some plea which in effect admits the jurisdiction of the court. The plea in this cause did not go to the merits of plaintiff's cause of action or his right to sue thereon, but was simply an assertion that the defendant was not in court and

that the court had no jurisdiction of his person or of his property, because there had been no service of process, either upon him personaliy or so as to affect any property owned by him.

We must therefore conclude that when the answer of the garnishee was filed and the same was not traversed within the time provided for by law, such answer was conclusive as to the facts therein stated, namely, that no property belonging to the defendant in error or debts due to him was reached by such garnishment, and as no other property of the defendant was seized under the attachment and there was no personal service upon the defendant, the court had acquired no jurisdiction and was without jurisdiction to proceed further; that all the subsequent proceedings, orders, and decrees therein, except the order dismissing said cause, were *coram non judice* and void. As the court below entered a final order dismissing the cause *was* want of jurisdiction, although not upon grounds herein approved, the judgment below was for the right party and said judgment is affirmed.

The other judges concur, except Bierer, J., who tried the cause below, and Keaton, J., who was of counsel not sitting.

Endorsed: Filed February 12th, 1897. Edgar W. Jones, clerk supreme court.

100 In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.

Notice of Petition for Rehearing.

To the above-named defendant in error and Asp, Shartel & Cottingham, *their* attorneys of record:

You are hereby notified that the above-named plaintiff in error, by its attorneys, S. H. Harris, William D. Williams, and Cotteral & Hornor, will within the time allowed by the rules of the above-named court file in said court their petition for a rehearing of the above-entitled cause and ask a reconsideration and reversal of that part of the decision of said court rendered and filed on the 12th day of February, 1897, which is adverse to this plaintiff in error and affirms the decision of the trial court.

S. H. HARRIS,
WM. D. WILLIAMS, &
COTTERAL & HORNOR,
Att'ys for Pl'ff in Error.

We hereby accept service of the above and foregoing notice of filing petition for rehearing in the above-entitled cause this 20th day of Feb., 1897.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Defendant in Error.

Endorsed: Central Loan & Trust Co. *vs.* Campbell Com. Co. Notice of application for rehearing. Filed March 4, 1897. Edgar W. Jones, clerk. S. H. Harris, Wm. D. Williams, & Cotteral & Hornor.

101 In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.

Petition for Rehearing.

S. H. Harris, Wm. D. Williams, and Cotteral & Hornor, attorneys for plaintiff in error.

Endorsed: Filed March 3, 1897. Edgar W. Jones, clerk supreme court.

102 In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.

Petition for Rehearing.

Comes now the said plaintiff in error, by S. H. Harris, Williams and Newell, and Cotteral & Hornor, its attorneys, and complains of that part of the decision of this court rendered and filed in this cause upon the 12th day of February, 1897, which is adverse to the interests of this plaintiff in error, and prays the court for a rehearing upon the following grounds:

First. The court erred in considering the question of the jurisdiction of the trial court over the property of defendant in error upon the grounds stated in the decision, for the reason that said question was not assigned for error either in the petition or cross-petition in error, and was not presented or discussed in the briefs of counsel or the oral argument before this court upon the hearing of said cause, and in so considering, passing upon, and deciding said question the court overlooked the controlling decision of Carson *v.* Funk, 27 Kansas, 524, wherein it is said:

"Where, in an assignment of errors, the only errors complained of relate to matters occurring on the trial for which a new trial was prayed, but the action of the court in overruling the motion is not assigned for error, no question is properly raised in this court;" also "where errors are assigned in the petition in error, but no reference is afterward made to them either by oral argument or in the brief of counsel for the plaintiff in error, this court will take no notice of them."

See to same effect Wilson *v.* Fuller, 9 Kansas, 176; School District *v.* Carter, 11 Kansas, 447; Davis *v.* Filmore, 15 Kansas, 334; Campbell *v.* Phillips, 28 Kansas, 754. In the last case it is said by the court:

103 "While in his petition in error plaintiff challenged one ruling in respect to the admission of testimony, yet in their brief counsel ignore this and challenge simply the findings of fact made by the referee. Of course, our inquiry will therefore be limited to the single matter counsel discussed in their brief."

The rule is perfectly well settled in Kansas that the supreme court will consider all questions waived which are not presented in the argument, even though such questions be assigned for error. But in this case the question considered by the court was not even assigned for error. Under such circumstances it is uniformly held that the question is not before the court and cannot be considered by the court, being *coram non judice*. This results necessarily from the language of section 561 of the Code, which provides that "the petition in error shall set forth the errors complained of." An error not set forth is therefore not before the court.

Second. The court erred in considering defendant in error's special plea to the jurisdiction of the district court, viz: "That said court had no jurisdiction because no actual services had been made upon the defendant and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process," for the reason that the question thus presented was not before the supreme court, not having been assigned as an error and not having been argued either in the briefs or orally. In considering this question the court overlooked and ignored the controlling decisions cited in the preceding paragraph of this petition.

Third. The court erred in holding that the garnishee held the property in question "under a vendor's lien, and that by the terms of the contract creating such lien title to the property was not to pass to the defendant, but was to remain in the garnishee," etc.

For the reason that said holding is inconsistent in this, that if the garnishee held the property under a vendor's lien he could not possibly be the owner of the property. It is expressly provided in section 3190, Statutes of 1893, that a lien upon property con-

104 fers no title, and it is furthermore provided in section 3181 of the same statute that "a lien is a charge imposed upon specific property by which it is made security for the performance of an act." Hence it necessarily results that if the garnishee merely had a lien upon the property he was not the owner thereof, and his interest in the property would simply be to the extent of his lien, or, to put the matter differently, under our statutes a lien cannot subsist concurrently with ownership, and where the two come together in the same person the lesser interest is swallowed up in the greater.

Fourth. The court erred in holding that in the absence of a notice in writing of plaintiff in error's election to take issue on the answer of the garnishee the garnishee's answer became conclusive "of the

truth of all the facts stated therein," and that "such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached, and that no debts or liabilities were owing to him by such garnishees, and that whatever interest he might have had in said property had before the garnishment been lawfully assigned and conveyed to Stoddard," and in the same connection the court erred in holding "that when the answer of the garnishee was filed and the same was not traversed within the time provided by law such answer was conclusive as to the facts therein stated, viz., that no property belonging to the defendant in error or debts due him was reached by such garnishment;" and the court erred in affirming the judgment of the court below for the dismissal of said cause, and in holding that the court had no jurisdiction of the case because of the fact that no property of the defendant had been seized by attachment, and in so holding the court overlooked and ignored many controlling decisions and authorities, some of which were presented in the briefs of plaintiff in error. Upon this proposition plaintiff in error, at page 13 of their brief filed May 28, 1896, cited the case of National Bank *v.*
Peters (Kansas), 23 Pacific Reporter, 637, in which case the
105 court used the following language:

"Where there is a seizure and detention of property under an attachment proceeding the court has jurisdiction therein with limited notice and effect, notice being limited to the debtor and the attached property being proceeded against only as his."

This case clearly holds that the title to the property attached can only be questioned in a direct proceeding for that purpose, and then only upon a complaint of some person other than the defendant who claims to own the property. Upon the same point plaintiff in error cited Wade on Attachment, section 289, wherein the author says: "The defendant cannot properly move to discharge the attachment on the ground that the property attached does not belong to him." See also the following authorities which were overlooked by the court, to wit: Mitchell *vs.* Skinner, 17 Kansas, 563, in which the court say: "It is not competent for the defendant to move the court to discharge an attachment or set aside a levy under an execution on the ground that the property attached or levied upon does not belong to him, and it is error for a court to sustain such motion." To the same effect see Langdon *v.* Conklin, 10 Ohio State, 439.

The defendant in error sought to avoid the effect of these decisions by asking in his motion that the attachment be dissolved and the action dismissed for the following reasons: "Third, because there has been no seizure of any of the defendant's property in the jurisdiction of this court, neither by attachment nor garnishment process," and goes on to refer to the answer of A. H. Pierce, garnishee, as disclosing the facts relied upon, and then suggests, in the latter part of this ground of his motion, that there is no basis for constructive services. The authorities cited go to the right of the defendant to move a dissolution of the attachment upon this ground and do not permit of the establishment of the fact by any kind of

evidence. If the defendant could not ask a dissolution of the attachment on the ground that he did not own the property attached, then, under the general rule that one cannot do by indirection what he is not permitted to do directly, the defend-
106 ant had no right to ask the court to dissolve the attachment because there was no basis for services by publication, for the reason that the property attached did not belong to him under the statutes of Oklahoma and the decisions construing the same, the attachment, in a case where the debt is not due, is the principal thing, and unless the attachment be sustained the action itself must be dismissed. Pierce *v.* Myers, 28 Kansas, 369; Wurlitzer *v.* Suppe, 38 Kansas, 34. In this case the defendant in error sought to defeat the proceeding on the ground that the attached property did not belong to the defendant. There was no independent action pending against the defendant. It was simply a proceeding *in rem;* and, notwithstanding the decisions just cited, it is held by this court that the defendant may defeat the attachment by showing that the property attached does not belong to it. This is the precise thing that is prohibited by the decisions. The force and effect of the decisions quoted is that a defendant cannot escape liability under an attachment on the ground that the property does not belong to him. The meaning of the decisions undoubtedly is that the question of ownership can only be raised by the person who claims to be the owner; therefore it was error for the court to hold that the defendant in this case could raise the question.

Fifth. The court erred in permitting the defendant in error to attack the return of the sheriff showing that he had attached and taken into his possession certain property belonging to said defendant in error and ruling that defendant in error might attack said return and might contradict the same and show that no property belonging to defendant in error had been seized by the sheriff, and in so holding the court overlooked certain controlling authorities, to wit, Repine *v.* McPherson, 2 Kansas, 340, where it is held that the jurisdiction of the court in attachment proceedings is fixed by the sheriff's return of the writ; also Rice on Evidence, vol. I, page 218, where the author says, "Even when the evidence
107 unequivocally shows the falsity of the official return, it is still regarded as invulnerable and controlling until set aside by the proper authority. So long as it remains unvacated it is not assailable nor even open to collateral attack." See the same authority, pages 219 and 220.

Sixth. The court erred in that in its opinion it has made no mention of the fact that the return of the sheriff shows that he had attached a large amount of property of the defendant in error, and in overlooking said fact the court overlooked a controlling fact in the case.

Seventh. The court erred in not making sufficient findings of fact to clearly explain the decision which would naturally and properly follow the statement of facts, and the court particularly erred in not setting out in the opinion a copy of the contract which

was set out and pleaded in the garnishee's answer, and in so doing the court overlooked a material fact in the case.

Eighth. The court also erred in overlooking and failing to consider the material and controlling fact, as disclosed by the record, that the trial court had affirmed and acted upon the sheriff's return and had appointed a receiver to take charge of and sell the attached property, and that the receiver so appointed had receipted the sheriff for and taken charge of the attached property, and the further fact that said receiver was the garnishee, Pierce, whose answer in garnishment is referred to in the opinion of this court, and who, simultaneously with the filing of his answer in garnishment, filed also a sworn interplea in the main suit, wherein he stated under oath that the property in question has been taken out of his possession and seized in attachment by the sheriff; and the court also overlooked and failed to consider the fact that the plaintiff in error had filed an answer to the interplea of said Pierce and had taken issue with him as to the ownership of the attached property, which issue plaintiff in error had a right to try with said garnishee, and by virtue of which interplea said Pierce had voluntarily submitted the question of ownership to the court for determination, the
108 effect of all which was to merge the lesser proceeding into the greater and thereby make it dependent upon the outcome of a trial.

Ninth. The court also erred in overlooking and failing to consider in connection with the last assignment the fact that one Stoddard, who claimed to be the assignee of defendant in error's interest in the property attached, had filed an interplea in the case, claiming to be the owner of defendant in error's interest in the property, upon which interplea an issue had been joined by plaintiff in error and which issue plaintiff in error had a right to try.

Tenth. The court erred in failing to consider the material facts disclosed by the record that in the interplea filed by the garnishee said garnishee stated under oath that the property in question had been attached by the sheriff and taken out of his possession, and that after his appointment as receiver he receipted to the sheriff for the property, which said interplea of the said Pierce should have been taken and treated as part of his answer in garnishment and as modifying the same to the extent stated in said interplea, and the court erred in failing to so consider said allegations in the interplea.

Eleventh. The court erred in failing to notice and consider the fact, as disclosed by the record, that in plaintiff in error's answer to the interplea of said Pierce plaintiff in error alleged that said Pierce had waived the conditions of his contract with the defendant in error by allowing the property to be attached and accepting the appointment as receiver for the benefit of defendant in error under an order which recited in substance and effect that said Pierce was only interested in the property to the extent of his claim for the purchase price, and which provided that said Pierce should go ahead and sell the property as provided in the contract and pay himself the sum of fifteen dollars ($15.00) per head for the cattle, as

specified in the contract between him and defendant in error; in all of which said Pierce admitted that his claim against the property was simply for the indebtedness owing him, and that
109 he did not claim to be the absolute owner of the property, but only claimed to have a lien thereon, which facts would have been material testimony on the hearing of the issue as to whether said Pierce was the owner of said property and as tending to show whether, if he had originally been the owner, he had not subsequently waived this condition in the contract. Upon this point see Newmark on Sales, sections 302 and 303.

Twelfth. The court erred in failing to consider the rights of Stoddard, Miller & Son, and A. H. Pierce, interpleaders, as shown by the record, and on account of this oversight disposed of the rights of all these parties as well as those of the plaintiff in error in the attached property upon the *ex parte* statement of Pierce as garnishee upon a matter that did not in any way affect his rights as such. The attachment reached and held whatever right the defendant in error had in the cattle attached, and if Pierce waived his right of possession there was no — else who could legally be heard to complain, unless it was some other person claiming to own the property or an interest therein, and the statute provides that such claimant may intervene in the action and set up his interest, which, of course, the plaintiff in the action had a right to deny, and both parties would then be entitled to a trial; and this court seems to have overlooked the fact that at the time of dissolving the attachment by the trial there was such an action pending between the plaintiff in error and three other parties; in other words, there was at said time an issue joined in court between several parties who claimed the property, which issue said parties had an unqualified right to try under the statutes of this Territory; but, notwithstanding this, the court has held in effect that by taking the position that it did not own said property the defendant in error could defeat the proceeding between the parties who were contending for said property, in the face of controlling decisions to the effect that the defendant can raise no such question.

110 Thirteenth. The court erred in holding that the answer of the garnishee, not having been controverted, was conclusive as to all the facts therein stated in an action separate and distinct from that wherein said answer was filed and as between different parties and upon different issues, and in so holding the court overlooked the following controlling authorities, to wit: Shinn on Attachment, vol. 2, sec. 638, where the author says: "The rule relating to the effect of the garnishee's answer as evidence and the conclusiveness thereof relates only to questions arising between the parties in the garnishment proceeding." And also Rood on Garnishment, 374, where the author says: "So far as the conduct of the case is concerned, it is entirely independent of the main action and substantially another suit." See also to the same effect Rice on Evidence, page 983. The statute provides that if a plaintiff in an action is not satisfied with the return of the garnishee he may serve notice that he elects to take issue thereon, and the affidavit for gar-

nishment and the return of the garnishee constitute the petition and answer in the action between the plaintiff and garnishee; and as the parties would be permitted to try and determine such questions only as affect the liability of the garnishee to the defendant in the action, other statements not relating thereto would be treated as surplusage under the general rule relative to proceedings in civil actions. In other words, the plaintiff alleges in his affidavit for garnishment that the garnishee has money or property of the defendant or is indebted to him, and the garnishee may answer that he has not, and if the plaintiff be not satisfied with the answer he may elect to have a trial of the truth thereof. In this case the record discloses the fact that prior to the garnishment plaintiff in error had levied an attachment on five thousand head of cattle as the property of the defendant in error, and the sheriff duly took said cattle into his possession and was holding them at the time the garnishment summons was served. The fact that the garnishee may have answered that he had no property of the defendant in
111 his possession at the time he was served with the summons would signify nothing to plaintiff in error, unless plaintiff in error desired to show that the garnishee had property other than the cattle which the sheriff held under attachment. In so far as the garnishee's answer showed that he held possession of the cattle at the time garnishment summons was served, it was untrue, as is disclosed by the record, which shows that the sheriff had the cattle and that the court had acted upon this fact and had appointed a receiver to take charge of the cattle under attachment, thus passing upon and adjudicating the fact that the sheriff held possession of the cattle. Plaintiff in error was entitled to rely upon the attachment proceedings and upon the adjudication of the court to the effect the sheriff held the cattle, and the garnishee could not prejudice this right of plaintiff in error by going outside of the requirements of the garnishment summons and pleading facts which were not true and which were directly contradicted by the allegations of his interplea, which he filed at the same time; which were further contradicted by the record in the case, the judgment of the court, and the subsequent action of the garnishee in accepting the appointment as receiver. The plaintiff in error, knowing that the sheriff held five thousand head of cattle under attachment, had the right to ignore the statement of the garnishee that he held said cattle, and the only proper order for the court to make, in case the court was of opinion that the garnishee was not answerable, was simply to have discharged the garnishee. In discharging the garnishee the court would have no right to dismiss the proceedings as to the other defendants and to release the cattle which were held by the sheriff under attachment. It would be unreasonable to expect under such circumstances that plaintiff in error would undertake to deny the garnishee's answer to the effect that he held the cattle, because plaintiff in error would *now* that the garnishee did not hold the cattle, but that the sheriff did hold them, and plaintiff in error would have no occasion to go into a trial with the garnishee
112 for the purpose of trying the question whether the garnishee held the property or the sheriff held it. In such case the

plaintiff in error would naturally stand upon the attachment, assuming that the possession of the sheriff would not be disturbed or the attachment vacated except in a direct proceeding brought for that purpose, and plaintiff in error would have a right to stand upon this assumption.

Fourteenth. The court erred in holding that the answer in garnishment might be looked to for the purpose of determining whether the property had or had not been seized in the main suit, to which the garnishment was auxiliary, and the court erred in holding that the answer in garnishment was evidence touching the jurisdiction of the court, or that such answer could be given weight or in any manner considered upon motion to dismiss the attachment proceeding for want of jurisdiction.

Fifteenth. The court erred in holding that the construction which was placed upon the contract, set out in the garnishee's answer by the garnishee himself, was binding and conclusive, and the court erred in considering the conclusions of the garnishee with reference to the legal force and effect of the contract, and in so holding the court overlooked many controlling decisions which hold, in effect, that the construction of written instruments is for the court, and that where a party pleads a written instrument the court will look to the instrument itself and not to what the party says about it for the purpose of determining what it is and what it means. The general rule is too well settled to call for the citation of authorities, but as applied to the answers of the garnishees see Rood on Garnishment, sec. 313, also 301, where the author says: "The garnishee should state facts, not conclusions of law. Where both facts and conclusions are stated, the former control and the latter are disregarded. There is no necessity to controvert the answer in such cases." That is to say, there is no need of disputing conclusions of law. The legal effect of the failure to controvert the garnishee's answer in this case was simply to admit that a contract of the
113 kind and character set out in the garnishee's answer had been entered into between the parties thereto. The construction of the contract was a matter for the court. Where the plaintiff admits that a certain contract in writing has been entered into between the defendant and the garnishee the question before the court is, What is the legal force and effect of the contract? In such case there is no need to take issue with the garnishee on the facts. The only issue is the one of law. Our statute specifically provides that "the plaintiff may in all cases move the court upon the answer of the garnishee and of the defendant, if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answer." This section manifestly applies to cases where the plaintiff admits the allegations of fact set out in the garnishee's answer. The section means this or it means nothing. The plain import of the statute is that the plaintiff may take either of two courses with reference to the garnishee's answer. He may take issues on the facts by giving the notice provided in sec. 207 of the Code or he may permit the answer to stand without taking issue

and move "for such judgment as he shall be entitled to thereon." Under the authorities cited it was error for the court to hold that the answer of the garnishee was conclusive of anything in the main case, but even if it were proper to consider the garnishee's answer as a part of the main case it would simply be construed as any other pleading would be, and if a written contract were set up in the answer the court would inspect the contract and declare its legal force and effect.

Sixteenth. The court erred in holding that the contract between the garnishee and the defendant in error was an executory contract of sale, and in so doing overlooked numerous controlling decisions and authorities, among which are the following, to wit: McManara *v.* Culver, 22 Kansas, 668, wherein the court say with refer-
114 ence to whether a contract is a mortgage or a conditional sale: "An absolute conveyance and a separate agreement to reconvey, though executed simultaneously as parts of one transaction, may or may not constitute a mortgage, and equity is not concluded by the form, but will have regard to the actual facts. The test is the existence or non-existence of a debt. If after a transaction no debt remains, there is no mortgage, but only a conditional sale." In the opinion the court says: "The test is the existence or non-existence of a debt, and equity looks behind the form to the fact. If the transaction was intended as loan; if there remains a debt for which the conveyance is only a security and the collection of which may be enforced independent of the security, equity will hold its mortgage, no matter whether the transaction is evidence by one or two instruments. But if there be no debt there can be no security, no mortgage." In Jones on Mortgages, sec. 265, it is said that "a debt, either pre-existing or created at the time, is an essential requisite of a mortgage." In Glover *v.* Payne, 19th Wendell, 518, Bronson, J., says: "Where there is no debt and no loan it is impossible to say that the agreement to resell will change an absolute deed into a mortgage." To the same effect see Oeerstreet *v.* Baxter, 30 Kansas, 55; Eckert *v.* McBee, 27th Kansas, 232. In Tufts *v.* Beach (Col.), 44 Pacific, 771, the court says: "An instrument executed by a buyer reciting that the buyer is indebted to the seller in a certain sum, evidence- by notes given for the price of goods, the condition of the purchase being that the possession of the property is to remain in the seller until payment of the price, is a chattel mortgage, as the buyer is unconditionally liable for the payment of the price." In Savings Bank *v.* Theatre Company (Col.), 36 Pacific, 902, the court says: "Where a person bought certain furniture stipulating that the title should remain in the vendor until fully paid for and gave his notes for the unpaid price, the transaction was an absolute sale, with a reservation of a lien to secure payment, and, not being executed and acknowledged
in conformity with the chattel-mortgage act, is void as to
115 one to whom the property had been mortgaged by the purchaser." In Gart *v.* Manufacturing Company, 7th Federal Reporter, 553, the court says: "If by the terms of the agreement the purchaser becomes liable unconditionally for the purchase

price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the registration statute, as its purpose is simply to retain a secret lien." In Savings Bank *v.* Theatre Company, *supra*, the court conclude in the following language: "We are clearly of the opinion that the agreement and notes evidencing the transaction between the interpleaders and Smith constituted an absolute sale, and that the attempt to reserve a lien on the property as security for the payment of the purchase price was void as to third parties as being in contravention of our chattel-mortgage act." The Colorado cases are exhaustive, and should receive the respectful consideration of the court. In Hervey *v.* Locomotive Works, 93 U. S., 664, the question is fully considered by the Supreme Court of the United States. It is there said: "Secret liens which treat the vendor of personal property who has sold it and delivered possession of it to the purchaser as the owner until the payment of the purchase-money cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. McCormick *v.* Hadden, 37 Ill., 370; Ketchum *v.* Watson, 24 Ill., 591. Nor is the transaction changed by the agreement assuming the form of a lease. Courts will always look to the purpose to be attained by the contract rather than the name given to it by the parties in order to determine its real character. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money it is liable to be defeated by creditors of the purchaser who is in possession of it." In Herryford *v.* Davis, 102 U. S., 235, the question is considered at length by the Supreme Court of the United States. The
116 court there says: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties gathered from all the language they have used. It is the legal effect of the whole which is to be sought for; the form of the instrument is of little account." After considering the contract at some length, the court says: "In view of this provision we can come to no other conclusion than that it was the intention of the parties manifested by the agreement the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not given an option to buy or not. They were bound to pay the price either by paying their notes or certain property to be sold in order to make payments. This was in no sense a conditional sale. This giving property as security for the payment of a debt is the very essence of a mortgage, which has no existence in the case of conditional sale;" and the court was of the opinion that, "though the contract repeatedly spoke of loaning the

cars to the railroad company for hire, yet the true force and effect of the contract was a sale outright with the reservation of title to secure the purchase price," and the court held that such a contract was a mortgage. This accords exactly with our statute upon the subject: "A lien is a charge imposed upon specific property by which it is made security for the performance of an act." (Statutes of 1893, sec. 3181.)

The Supreme Court of the United States has reiterated this doctrine in a number of decisions. Chicago R'y Equipment Co. *v.* Merchants' National Bank, 136 U. S., 368; Arkansas Valley Co. *v.* Mann, 130 U. S., 69. In 4 Kent's Commentaries, p. 144
117 (last edition), the following cases are cited in support of the rule, as herein announced, that if there be a debt the transaction is a mortgage, viz:

Slee *v.* Manhattan Co., 1 Paige, 48.
Goodman *v.* Grierson, 2 Ball. & Beat., 274.
Conway *v.* Alexander, 7 Cranch, 237.
Robertson *v.* Cropsey, 2 Edw. Ch., 138.
Flagg *v.* Mann, 14 Pick., 467.
Holmes *v.* Grant, 8 Paige, 243.
Alderson *v.* White, 2 De G. & J., 97.
Brewster *v.* Baker, 20 Barb., 364.
Locke *v.* Palmer, 26 Ala., 312.
Murphy *v.* Barefield, 27 Ala., 634.
West *v.* Hendrix, 28 Ala., 226.
Hooper *v.* Bailey, 28 Miss., 328.
Davis *v.* Stonestreet, 4 Ind., 101.
Lucketts *v.* Townsend, 3 Texas, 119.
Brown *v.* Dewey, 2 Barb., 28.
Baker *v.* Thrasher, 4 Denio, 493.
Bethlehem *v.* Annis, 40 N. H., 34.
Brantly on Personal Property, 229.
A. & E. of Law, "Cond. Sales."

In the cases cited from Paige's Reports, *supra*, are supported by extended notes in the lawyer co-op. edition. These notes cite a large number of additional cases.

Following is a synopsis and summary of an exhaustive note to the case of Hutzler *v.* Phillips (S. C.), 4 Am. St. Rep'ts, 699.

(1.) If transaction resolves itself into a security it is a mortgage, no matter what its form may be or what the parties choose to call it.

(2.) In all doubtful cases the transaction will be treated as a mortgage.

(3.) The test of a mortgage is a debt. If there is no debt there is no mortgage, but a conditional sale. If there be a debt the transaction is a mortgage.

(4.) Where there is doubt as to the real character of a transaction the intention of the parties, to be gathered from the face of the writing, their situation, and the surrounding facts and circumstances, is to govern.

(5.) When it is not clear upon the face of the writing what the intent of the parties was the question should be left to the jury.

Each of the above propositions is supported by many au-
118 thorities in the note, all of which authorities were overlooked by the court in its decision.

Seventeenth. As hereinbefore stated, it was error for the court to consider the case upon a point not assigned as error and not argued by counsel. But even though this court may decline to follow the well-settled doctrine of the Kansas supreme court in the premises, it was still error for the court to take the case up and decide it upon a point not assigned as error and not argued, for the reason that plaintiff in error had the right to assume that this court would follow the rule in Kansas and, therefore, to take the case up and decide it upon a point not raised without giving plaintiff in error an opportunity to argue the point was prejudicial error because it deprived plaintiff in error of a substantial right. It is error for the court to depart from a well-settled rule of practice without giving litigants notice thereof, and plaintiff in error insists that it is entitled to be heard upon the question considered and passed upon by the court.

Eighteenth. It was error for the court to render judgment in favor of defendant in error and against plaintiff in error.

For all of these reasons plaintiff in error says that the decision of the court was erroneous, and plaintiff in error therefore respectfully prays a rehearing of the case.

S. H. HARRIS,
WM. D. WILLIAMS, AND
COTTERAL & HORNOR,
Attorneys for Plaintiff in Error.

119 THE CENTRAL LOAN AND TRUST COMPANY, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, Defendant in Error. } # 419.

And now, to wit, on this the 14th day of June, A. D. 1897, the above cause having come on for decision upon a petition for review and rehearing, and the court being fully advised in the premises, it is therefore considered, ordered, and adjudged that the said petition be, and the same is, in all things denied with costs to appellants.

And now comes S. H. Harris, Esq., counsel for the above-named plaintiff in error, and takes exceptions to the ruling of the court and serves notice for an appeal to the United States Supreme Court, and the said appeal to the Supreme Court of the United States is hereby allowed. Counsel for plaintiff in error also presents a petition praying for the allowance of a writ of error intended to be urged by the above plaintiff in error praying that a transcript of the record and proceedings and papers by which the judgment herein was rendered, duly authenticated, be sent to the Supreme Court of the United States, and that such other and proper proceedings may be had as may be proper in the premises; on considera-

tion whereod the court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of — dollars, and which shall operate as a supersedeas bond.

120 And afterwards and on the 24th day of June, A. D. 1897, a certain judgment and order was entered on the journal of the said supreme court of the Territory of Oklahoma in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Journal Entry.

Now, on the 14th day of June, 1897, this cause comes further on for hearing and disposition upon the petition for rehearing filed by plaintiff in error, the said plaintiff in error appearing by S. H. Harris and Cotteral & Horner, its attorneys, and the defendant in error appearing by Asp, Shartel & Cottingham, its attorneys. Upon consideration of said petition for rehearing, the same is by the court denied, and the judgment heretofore rendered in this cause on the 12th day of February, A. D. 1897, affirming the judgment of the lower court, is in all things affirmed; to which judgment of February 12, 1897, and the order and decree of the court denying the petition for rehearing and affirming the said judgment and the judgment of the lower court the plaintiff in error at the time excepted and excepts, and the said exception is by the court allowed.

Whereupon plaintiff in error in open court prays the allowance of an appeal and a writ of error to the Supreme Court of the United States from said judgment, order, and decree, and asked the court to fix the amount of the appeal bond to be a supersedeas, and
121 also the amount of bond to qualify the writ of error as a supersedeas in this cause, and, on account of the uncertainty as to the proper procedure to take said cause to the Supreme Court of the United States for review, plaintiff in error is in open court allowed an appeal and writ of error as prayed for, and the bond in said appeal is fixed at the sum of two thousand five hundred dollars ($2,500.00), which it is ordered and directed shall be a supersedeas in this cause, and the bond in said proceeding in error is fixed at the sum of two thousand five hundred dollars ($2,500.00), upon the execution of which the writ of error granted herein shall be served as a supersedeas.

122 And afterwards, on the 24th day of June, A. D. 1897, there was filed in said cause a petition for a writ of error, which said petition for a writ of error is in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error, with Assignment of Errors at Law.

Comes now the plaintiff in error, The Central Loan and Trust Company, and says that on the 14th day of June, A. D. 1897, this court entered judgment herein in favor of the defendant in error and against this plaintiff in error, denying the petition of plaintiff in error for a rehearing and reconsideration of the judgment heretofore rendered in this court against the plaintiff in error and affirming the decision of the lower court, which judgment and the judgment heretofore rendered on the 12th day of February, A. D. 1897, was in affirmance of the judgment of the lower court in favor of defendant in error and against this plaintiff in error, in which said judgments, orders, decrees, and proceedings had therein and in relation thereto and the judgment of the court below, affirmed by the judgment and decree of this court in this cause, certain errors were committed, to the prejudice of this plaintiff in error; all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

123 The plaintiff in error further in its behalf shows that the amount in controversy in this cause, exclusive of costs, exceeds the sum or amount of five thousand dollars ($5,000.00) and is of about the sum and amount of seventeen thousand dollars ($17,000.00), as more fully appears by the transcript of the record of said cause.

S. H. HARRIS,
WILLIAM D WILLIAMS,
JOHN H. COTTERAL, AND
C. G. HORNOR,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, } *ss:*
County of Logan, }

C. G. Hornor, being first duly sworn according to law, on his oath states that he is one of the attorneys for the plaintiff in error; that he is familiar with the controversy involved in this cause and knows the amount at issue therein and involved therein and of controversy therein and knows the amount of controversy *of* said cause, exclusive of costs, to exceed the sum of five thousand dollars ($5,000.00), and to be of about the sum of seventeen thousand dollars ($17,000.00) as more fully appears by the record in this cause,

which is hereby referred to, and the statements of plaintiff in error with reference to the promissory note sued on and the amount due thereon are hereby made a part of this affidavit.

C. G. HORNOR.

Subscribed and sworn to before me this 24th day of June, 1897.

EDGAR W. JONES,

[SEAL.] *Clerk of the Supreme Court.*

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

124 And afterwards and on the 24th day of June, A. D. 1897, there was filed in said cause an assignment of errors in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Assignment of Errors.

The plaintiff in error in this action, in connection with its petition for writ of error and as a part thereof, makes the following assignments of errors, which it avers occurred upon the trial of this cause, to wit:

First. The court erred in denying the petition of plaintiff in error for a rehearing *in* said cause.

Second. The court erred in affirming the judgment of the court below.

Third. The court erred in considering the question of the jurisdiction of the trial court over the property of the defendant in error or the ownership of the property attached in the proceeding, when the same was not assigned as error or in any manner presented to the court for consideration or determination.

Fourth. The court erred in holding that the motion of defendant in error to set aside the attachment for the want of jurisdiction over the property of the defendant could be considered as an attack upon the service by publication.

Fifth. The court erred in holding that the affidavit of the garnishee could be considered as evidence, showing conclusively
125 that the property attached was not the property of the defendant in error.

Sixth. The court erred in holding that the answer of the garnishee could be considered for any purpose other than as showing his liability or non-liability to the defendant in error at the time of the service of garnishment summons upon the garnishee.

Seventh. The court erred in considering the claim and contention of defendant in error that it was not the owner of the property attached.

Eighth. The court erred in considering defendant in error's plea to the jurisdiction of the district court set out in the following language: "That said court had no jurisdiction, because no actual service had been made upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process," said question and proposition not being presented to the court in the brief or argument or assigned as error.

Ninth. The court erred in holding that in the absence of notice in writing of plaintiff in error's election to take issue on the answer of the garnisheè, the garnishee's answer became conclusive "of the truth of all facts stated therein," and that "such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached;" and in the same connection the court erred in holding "that when the answer of the garnishee was filed and the same was not traversed within the time provided by law such answer was conclusive as to the facts therein stated, viz., "that no property belonging to the defendant in error had been attached."

Tenth. The court erred in ignoring the return of the sheriff showing that he had attached the property of the defendant and in ignoring the further proceedings in the cause showing that the property had been sold as the property of the defendant, and that the proceeds were then in the hands of the receiver appointed by the court to abide the determination of the court in the case.

126 Eleventh. The court erred in considering the answer of the garnishee with reference to the ownership of the property as sufficiently establishing the fact of ownership and overthrowing the return of the officer upon the writ of attachment.

Twelfth. The court erred in ignoring the fact that the garnishee who had interpleaded in the action charged under oath that the property had been seized by the sheriff and taken out of his possession, and the further fact that the garnishee after filing said interplea abandoned all claim to the property and accepted the appointment as receiver for the court.

Thirteenth. The court erred in disposing of the rights of the plaintiff in error as well as Stoddard, Miller & Son, and A. H. Pierce, interpleaders, on the *ex parte* statement of the garnishee as to the ownership of the property in litigation.

Fourteenth. The court erred in holding the answer of the garnishee sufficient to affect and determine the rights of the plaintiff in error and the intervenors in the action and sufficient to deny such parties the right of trial by jury of the question of ownership of the property in litigation.

Fifteenth. The court erred in holding that the plea of the defendant in error in the trial court was not a general appearance in the action.

Sixteenth. The court erred in holding that the construction which was placed upon the contract set out in the garnishee's answer by the garnishee himself was binding upon the court as the proper construction of the contract and in not referring to and considering

the contract itself in determining its real meaning and legal force and effect.

Seventeenth. The court erred in holding that the contract set out in the answer of the garnishee created a vendor's lien upon the property in favor of the garnishee and was at the same time by its terms a conditional sale of the property by which title was
127 not to pass to the defendant, but was to remain in the garnishee.

Eighteenth. The court erred in holding that the contract set out in the answer of the garnishee had any greater force or effect than a chattel mortgage or lien to secure the payment of the purchase price of the property therein described.

Nineteenth. The court erred in holding that the answer of the garnishee could be considered as establishing the ownership of the property in himself after he had abandoned and waived his claim of ownership and possession.

Twentieth. The court erred in holding that the contract between the garnishee and the defendant in error set forth in the answer of the garnishee was an executory contract of sale by which no title to or interest in the property passed to the defendant in error, at the same time holding that the rights and interests of the defendant in error in the same property had been assigned to Stoddard, by reason of which there was no liability of the garnishee to the defendant in error.

Twenty-first. The court erred in holding that the defendant could assail the validity of the attachment on the ground that it was not the owner of the property attached.

Twenty-second. The court erred in sustaining the indirect attack of the defendant in error upon the attachment on the ground that it was not the owner of the property by considering the attack as one directed to the service, the sufficiency of which depended upon the attachment.

Wherefore the plaintiff in error prays that the said order and judgment herein complained of be reversed.

S. H. HARRIS,
WILLIAM D. WILLIAMS,
JOHN H. COTTERAL, AND
C. G. HORNOR,
Attorneys for Plaintiff in Error.

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

128 And on the said 24th day of June, A. D. 1897, a certain order was ordered entered on the journal of the supreme court of the Territory of Oklahoma in said cause in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Journal Entry.

Now, on this 14th day of June, A. D. 1897, comes the plaintiff in error, by its attorneys, S. H. Harris and Cotteral & Hornor, and file herein and present to the court its petition praying for an allowance of a writ of error intended to be urged by said plaintiff in error, and also filed herewith its assignment of errors, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof the court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of two thousand five hundred dollars ($2,500.00), which shall operate as a supersedeas bond.

129 And on the said 24th day of June, A. D. 1897, there was filed in the office of the clerk of the supreme court of said Territory a bond in supersedeas in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN & TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Supersedeas Bond.

Know all men by these presents that we, the Central Loan and Trust Company, a corporation, as principal, and M. C. Hurley and Benj. J. Tillar, as sureties, are held and firmly bound unto the defendant in error, The Campbell Commission Company, a corporation, in the full and just sum of two thousand five hundred dollars ($2,500.00), to be paid to the said Campbell Commission Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

The conditions of this obligation are as follows:

Whereas on the twelfth day of February, 1897, at a session of the supreme court of the Territory of Oklahoma holden at the city of Guthrie, in said Territory, and in a suit pending in said court between the said Central Loan and Trust Company, as plaintiff in error, and the said Campbell Commission Company, as defendant

in error, there was a judgment rendered against the said plaintiff in error and in favor of the defendant in error, affirming a certain judgment of the district court of Noble county, Territory of
130 Oklahoma, discharging an attachment and dismissing a certain cause theretofore pending in said district court, wherein this plaintiff in error was plaintiff and defendant in error defendant, and assessing the costs in said action against plaintiff in error;

And whereas on the fourteenth day of June, A. D. 1897, at a session of the supreme court of said Territory holden at the city of Guthrie, the said court denied the petition of plaintiff in error for a rehearing and reversal of said judgment and in all respects affirmed the said judgment so as aforesaid rendered by the said court on the twelfth day of February, A. D. 1897, and the said Central Loan and Trust Company, plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse said judgment of the 12th day of February, A. D. 1897, and the order denying a rehearing thereof, and a citation directed to the said defendant in error, citing and admonishing it to be and appear at a session of the Supreme Court of the United States of America to be holden at the city of Washington within thirty days from this date:

Now, the condition of the above obligation is such that if the said Central Loan and Trust Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs, including interest, and all other charges or assessments adjudged against plaintiff in error if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

CENTRAL LOAN & TRUST COMPANY,
By BENJ. J. TILLAR, *Its President.*
M. C. HURLEY, *Surety.*
BENJ. J. TILLAR, *Surety.*

Attest:
[SEAL.] J. M. LOGAN, *Sec'y.*

Approved this June 24th, 1897, by—
FRANK DALE,
Chief Justice.

Sealed and delivered in the presence of —— —— and —— ——.

Endorsed: Filed June 24th, 1897. Edgar —. Jones, clerk supreme court.

131 And afterwards and on the 24th day of June, A. D. 1897, there was deposited in the office of the clerk of the supreme court of the Territory of Oklahoma a writ of error and copy thereof; which said writ of error and copy is in words and figures following, to wit:

132 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

The President of the United States of America to the honorable judges and clerk of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma, before you, being the highest court of law or equity of the said Territory in which a decision could be had in the said suit between The Central Loan and Trust Company, a corporation, and The Campbell Commission Company, a corporation, wherein a judgment was rendered in said cause in favor of the defendant in error and against the plaintiff in error, dismissing the action of the plaintiff in error against defendant in error, and discharging and dissolving the attachment which plaintiff in error had sued out against the defendant in error in said cause, and adjudging that plaintiff in error take nothing by its said action, and affirming the judgment of the lower court in favor of defendant in error at the costs of plaintiff in error, and wherein the value of the property and the amount in controversy between said parties in said cause, exclusive of costs, as shown by the affidavit of C. G. Hornor, Esq., one of the attorneys of plaintiff in error, exceeded and exceeds the sum of five thousand dollars ($5,000.00) and is of about the sum of seventeen thousand dollars ($17,000.00), a manifest error hath happened, to the great damage of the said Central Loan and Trust Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at the said Supreme Court,
133 within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, in the year of the Independence of the United States of America the one hundred and twenty-second.

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

The foregoing writ is hereby allowed.
FRANK DALE,
[SEAL.] *Chief Justice of the Supreme Court of the Territory of Oklahoma.*

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

134 And on the 24th day of June, A. D. 1897, there was issued, returned, and filed in the office of said clerk of the supreme court of the Territory of Oklahoma a citation in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

To the Campbell Commission Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The Central Loan and Trust Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error prayed, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

I hereby accept personal service of this citation on behalf of The Campbell Commission Company, the defendant in error above named, this fifteenth day of June, A. D. 1897.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Defendant in Error in said Cause.

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk.

135 And afterwards and on the 24th day of June, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a statement on appeal, together with the allowance thereof, in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Petition on Appeal.

The above-named plaintiff in error, conceiving itself aggrieved by the judgment entered in this court on the 12th day of February, A. D. 1897, and also by the denial of its petition for a rehearing and affirmance of said judgment on the 14th day of June, A. D. 1897, does hereby appeal from the said order and judgment of affirmance of the judgment of the district court of the county of Noble and Territory of Oklahoma to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith and hereto attached, and it prays that its appeal may be allowed and a transcript of the record, proceedings, and papers upon which said judgment and order were made, duly authenticated, may be sent to the United States Supreme Court.

Dated this 14th day of June, 1897.

S. H. HARRIS,
WILLIAM D. WILLIAMS,
JOHN H. COTTERAL, AND
C. G. HORNOR,
Attorneys for Plaintiff in Error.

136 TERRITORY OF OKLAHOMA, } *ss:*
County of Logan, }

C. G. Hornor, being first duly sworn according to law, on his oath states that he is one of the attorneys for the appellant; that he is familiar with the controversy involved in this cause, and knows the amount at issue therein and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars ($5,000.00) and to be of about the sum of seventeen thousand dollars ($17,000.00), as shown by the original petition of plaintiff in error — a copy of the promissory note thereto attached, which petition and note for the purpose of this affidavit are referred to and made a part hereof.

C. G. HORNOR.

Subscribed and sworn to before me this 24th day of June, 1897.

[SEAL.] EDGAR W. JONES,
Clerk of the Supreme Court.

The foregoing claim of appeal is allowed in open court by order of the supreme court of the Territory of Oklahoma this 14th day of June, A. D. 1897.

Attest:

FRANK DALE,
Chief Justice.

Attest: EDGAR W. JONES,
[SEAL.] *Clerk of said Court.*

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

137 And filed with the foregoing statement on appeal was an assignment of errors; which said assignment of errors is in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.

Assignment of Errors on Appeal.

The plaintiff in error in this action in connection with its petition for an appeal and as a part thereof makes the following assignment of errors, which it avers occurred upon trial of this cause, to wit:

First. The court erred in denying the petition of plaintiff in error for a rehearing in said cause.

Second. The court erred in affirming the judgment of the court below.

Third. The court erred in considering the question of the jurisdiction of the trial court over the property of the defendant in error or the ownership of the property attached in the proceeding, when the same was not assigned as error or in any manner presented to the court for consideration or determination.

Fourth. The court erred in holding that the motion of defendant in error to set aside the attachment for want of jurisdiction over the property of the defendant could be considered as an attack upon the service by publication.

Fifth. The court erred in holding that the affidavit of the garnishee could be considered as evidence showing conclusively that the property attached was not the property of the defendant in error.

138 Sixth. The court erred in holding that the answer of the garnishee could be considered for any purpose other than as showing his liability or non-liability to the defendant in error at the time of the service of garnishment summons upon the garnishee.

Seventh. The court erred in considering the claim and contention of defendant in error that it was not the owner of the property attached.

Eighth. The court erred in considering defendant in error's plea to the jurisdiction of the district court set out in the following language: "That said court had no jurisdiction, because no actual service had been made upon the defendant and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process," said question and proposition not being presented to the court in the brief or argument or assigned as error.

Ninth. The court erred in holding that, in the absence of notice in writing of plaintiff in error's election to take issue on the answer of the garnishee, the garnishee's answer became conclusive "of the truth of all the facts stated therein," and that "such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached;" and in the same connection the court erred in holding "that when the answer of the garnishee was filed and the same was not traversed within the time provided by law such answer was conclusive as to the facts therein stated, viz., that no property belonging to the defendant in error had been attached."

Tenth. The court erred in ignoring the return of the sheriff showing that he had attached the property of the defendant, and in ignoring the further proceedings in the cause showing that the property had been sold as the property of the defendant, and that the proceeds were then in the hands of the receiver appointed by the court to abide the determination of the court in the cause.

Eleventh. The court erred in considering the answer of the
139 garnishee with reference to the ownership of the property as sufficiently establishing the fact of ownership and overthrowing the return of the officer upon the writ of attachment.

Twelfth. The court erred in ignoring the fact that the garnishee who had interpleaded in the action charged under oath that the property had been seized by the sheriff and taken out of his possession, and the further fact that the garnishee, after filing said interplea, abandoned all claim to the property and accepted the appointment as receiver for the court.

Thirteenth. The court erred in disposing of the rights of the plaintiff in error, as well as Stoddard, Miller & Son, and A. H. Pierce, interpleaders, on the *ex parte* statement of the garnishee after the ownership of the property in litigation.

Fourteenth. The court erred in holding the answer of the garnishee sufficient to affect and determine the rights of the plaintiff in error and the intervenors in the action and sufficient to deny such parties the right of trial by jury of the question of ownership of the property in litigation.

Fifteenth. The court erred in holding that the plea of the defendant in error in the trial court was not a general appearance in the action.

Sixteenth. The court erred in holding that the construction which was placed upon the contract set out in the garnishee's answer by the garnishee himself was binding upon the court as the proper construction of the contract and in not referring to and considering the contract itself in determining its real meaning and legal force and effect.

Seventeenth. The court erred in holding that the contract set out in the answer of the garnisheem created a vendor's lien upon the property in favor of the garnishee, and was at the same time by its terms a conditional sale of the property by which title was not to pass to the defendant, but was to remain in the garnishee.

140 Eighteenth. The court erred in holding that the contract set out in the answer of the garnishee had any greater force or effect than a chattel mortgage or lien to secure the payment of the purchase price of the property therein described.

Nineteenth. The court erred in holding that the answer of the garnishee could be considered as establishing the ownership of the property in himself after he had abandoned and waived his claim of ownership and possession.

Twentieth. The court erred in holding that the contract between the garnishee and the defendant in error set forth in the answer of the garnishee was an executory contract of sale by which no title to or interest in the property passed to the defendant in error, at the same time holding that the rights and interest of the defendant in error in the same property had been assigned to Stoddard, by reason of which there was no liability of the garnishee to the defendant in error.

Twenty-first. The court erred in holding that the defendant could assail the validity of the attachment on the ground that it was not the owner of the property attached.

Twenty-second. The court erred in sustaining the indirect attack of the defendant in error upon the attachment on the ground that it was not the owner of the property by considering the attack as one directed to the service, the sufficiency of which depended upon the attachment.

Wherefore the plaintiff in error prays that the said judgment and decree herein complained of may be reversed.

S. H. HARRIS,
WILLIAM D. WILLIAMS,
JOHN H. COTTERAL, &
C. G. HORNOR,
Attorneys for Plaintiff in Error.

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

141 And thereupon, on the 24th day of June, A. D. 1897, a certain order was entered on the journal of the said supreme court of the Territory of Oklahoma in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Journal Entry.

Now, on this 14th day of June, 1897, comes the above-named plaintiff in error, The Central Loan and Trust Company, a corporation, and files its petition on appeal and its assignment of errors on appeal in this cause, and upon examination thereof it is by the

court ordered that the said appeal to the Supreme Court of the United States be, and the same is hereby, allowed. It is further ordered that this appeal operate as supersedeas upon the plaintiff in error's giving bond in the sum of two thousand five hundred dollars as provided by law.

142 And on the said 24th day of June, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a bond in supersedeas in words and figures following, to wit:

In the Supreme Court of the Territory of Oklahoma.

THE CENTRAL LOAN AND TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
THE CAMPBELL COMMISSION COMPANY, a Corporation, Defendant in Error.
} Supersedeas Bond.

Know all men by these presents that we, the Central Loan and Trust Company, a corporation, as principal, and M. C. Hurley and Benj. J. Tillar, as sureties, are held and firmly bound unto the defendant in error, The Campbell Commission Company, a corporation, in the full and just sum of two thousand five hundred dollars ($2,500.00), to be paid to the said Campbell Commission Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

The conditions of this obligation are as follows:

Whereas on the twelfth day of February, 1897, at a session of the supreme court of the Territory of Oklahoma holden at the city of Guthrie, in said Territory, and in a suit pending in said court between the said Central Loan and Trust Company, as plaintiff in error, and the said Campbell Commission Company, as defendant in error, there was a judgment rendered against the said plaintiff in error and in favor of the defendant in error, affirming a
143 certain judgment of the district court, wherein this plaintiff in error was plaintiff and defendant in error was defendant, and assessing the costs in said action against plaintiff in error;

And whereas on the fourteenth day of June, A. D. 1897, at a session of the supreme court of said Territory holden at the city of Guthrie, the said court denied the petition of plaintiff in error for a rehearing and reversal of said judgment and in all respects affirmed the said judgment so as aforesaid rendered by the said court on the twelfth day of February, A. D. 1897, and the said Central Loan and Trust Company, plaintiff in error, having been allowed on appeal to the Supreme Court of the United States from said judgment and filed its petition and specification of errors therefor in the clerk's office of the said court to reverse the said judgment and order, and

a citation directed to the said defendant in error, citing and admonishing it to be and appear at a session of the Supreme Court of the United States of America to be holden at the city of Washington within thirty days from this date:

Now, the condition of the above obligation is such that if the said Central Loan and Trust Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs, including interest, and all other charges or assessments adjudged against plaintiff in error if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

CENTRAL LOAN & TRUST COMPANY,
By BENJ. J. TILLAR, *Its President.*
M. C. HURLEY, *Surety.*
BENJ. J. TILLAR, *Surety.*

Attest:
[SEAL.] J. M. LOGAN, *Sec'y.*

Approved this June 24, 1897, by—
FRANK DALE,
Chief Justice.

Sealed and delivered in the presence of —— —— and —— ——.

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

144 And afterwards and on the 24th day of June, A. D. 1897, a certain citation was issued, served, returned, and filed; which said citation, together with all the endorsements thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

To the Campbell Commission Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, within thirty days from this date next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein the said Central Loan and Trust Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and

of the Independence of the United States of *the United States of* America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

I hereby, on this 24th day of June, A. D. 1897, accept due personal service of this citation on behalf of The Campbell Commission Company, the appellee above named.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Appellee in said Cause.

Endorsed: Filed June 24th, 1897. Edgar W. Jones, clerk supreme court.

145 UNITED STATES OF AMERICA, } ss.
Territory of Oklahoma, }

To the Campbell Commission Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, within 30 days from this date next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein the said Central Loan and Trust Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

I hereby, on this 24th day of June, A. D. 1897, accept due personal service of this citation on behalf of The Campbell Commission Company, the appellee above named.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Appellee in said Cause.

146 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in a cause therein, entitled The Central Loan and Trust Company, a corporation, plaintiff in error, against The Campbell Commission Company, a corporation, defendant in error, as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and caused the seal of said court to be affixed, at my office, in the city of Guthrie, in Logan county, Oklahoma Territory, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: Case No. 16,643. Oklahoma Territory supreme court. Term No., 430. The Central Loan & Trust Company, plaintiff in error and appellant, *vs.* The Campbell Commission Company. Filed August 2d, 1897.

No. 480.

Brief of Williams for Pltff. in Err. on Mo. to Dismiss

Filed Oct. 16, 1897.

OCT 16 1897
JAMES H. MCKENNEY
CLERK

(16643.)

In The Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CENTRAL LOAN & TRUST CO.,

Plaintiff in Error and Appellant,

No. 480. vs.

THE CAMPBELL COMMISSION CO.,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief For The Central Loan & Trust Co., Appellant and Plaintiff in Error on the Motion to Dismiss Filed by the Appellee and Defendant in Error.

WILLIAM D. WILLIAMS,

Attorney for the Central Loan & Trust Co., Appellant and Plaintiff in Error.

W. D. BISHOP, Printer, 312 Main.

(*16643.*)

In The Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CENTRAL LOAN & TRUST CO.

Plaintiff in Error and Appellant,

No. 430. vs.

THE CAMPBELL COMMISSION CO.,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief For The Central Loan & Trust Co., Appellant and Plaintiff in Error on the Motion to Dismiss Filed by the Appellee and Defendant in Error.

WILLIAM D. WILLIAMS,
Attorney for the Central Loan & Trust Co., Appellant and Plaintiff in Error.

STATEMENT OF THE CASE AS TO THE INTERPLEA OF A. H. PIERCE.

Suit was filed in the District Court of Noble county, Oklahoma Territory on the 2nd day of July, 1895, by the Central Loan & Trust Co, plaintiff, against the Campbell Commission Co., defendant, on a promissory note for fifteen thousand dol-

lars ($15,000), with interest at eight (8) per cent per annum from September 1st, 1894. This note was not due when suit was filed. (Rec. 6). On July 2nd, 1894, the plaintiff, the Central Loan & Trust Co. filed its affidavit for attachment against the defendant (Rec. 7) and on the same day said plaintiff filed an affidavit for application for attachment. (Rec. 8). The order allowing the attachment was made and the writ of attachment was issued on the same day. (Rec. 8 and 11). The writ of attachment was executed July 3rd. 1895, by levying the same upon five thousand head of steer cattle (Rec. 11). July 6th, 1895, plaintiff made affidavit for writ of garnishment against one A. H. Pierce (Rec. 13) and the writ of garnishment was issued and served on the garnishee on the same day. (Rec. 13 and 14). August 26th, 1895, Pierce filed an answer in garnishment denying the possession of any of defendant's property and denying that he was indebted to defendant. (Rec. 19 to 23). This answer was never controverted and no judgment or action of the Court was ever had on the same. On the same day, August 26th, 1895, Pierce filed an interplea claiming the attached cattle. This interplea which was sworn to does not allege ownership in Pierce of the said cattle, but states he was entitled to the possession thereof and that said cattle had been wrongfully taken from him by plaintiff's attachment. (Rec. 16 and 17). On the same day, August 26, 1897, Pierce filed a motion which was not verified by affidavit, asking the discharge of plaintiff's attachment, because of certain facts urged in the motion. (Rec. 17 and 18). No action was ever had and no judgment was ever rendered on this interplea or motion. On September 7th, 1895, plaintiff asked the appointment of A. H. Pierce as receiver af the attached property, and on the same day he was appointed receiver without bond and was ordered to sell the cattle, and out of the proceeds to pay himself the amount of a lien claimed by him on

the said cattle and to hold the balance subject to the order of the Court. (Rec. 24 and 28). The right and interest which Pierce had claimed in said cattle, as shown by his interplea (Rec. 16) and by his answer in garnishment (Rec. 19 to 23) arose out of a contract which he stated in full in his answer in garnishment and by the terms of which he sold the attached property to the defendant in the lower court, the Campbell Commission Company, reserving a lien on the same and the right to retain the possession of said cattle to secure an unpaid balance of the purchase money. (Rec. 19 and 20). The right of Pierce to his lien and to the payment of the unpaid purchase money was conceded by plaintiff in its application for the appointment of a receiver (Rec. 24) and was protected by the Court in its order appointing Pierce receiver of said cattle with the right to sell the same and pay himself out of the proceeds. (Rec. 27). The order appointing Pierce receiver was approved by his attorney (Rec. 29) and Pierce accepted and qualified as receiver. (Rec. 29). Pierce afterward filed his report as receiver showing that he had sold the attached property and that out of the proceeds he had paid himself the full amount of the purchase money debt claimed by him in his interplea and answer in garnishment and that he still held as such receiver a balance of twenty-two thousand three hundred and sixty-one dollars and sixty-four cents ($22, 361.64), to which he made no claim and which he held subject to the order of the Court. (Rec. 38 to 42).

PROPOSITION.

A party to an action who has no legal interest in maintaining or reversing the judgment is not a necessary party to a writ or error or appeal from such judgment.

ARGUMENT.

This disposes of the Pierce interplea. He obtained satisfaction of every right which he claimed. His interplea was not brought to judgment. Every claim which he made in his answer in garnishment and in his interplea has been fully satisfied. Not only were his rights conceded by the plaintiff but they were also conceded by the interplea of W. A. Stoddard. (Rec. 31) and by the interplea of G. W. and J. C. Miller. (Rec. 44 to 46). No party to the suit claimed anything against Pierce nor has Pierce an unsatisfied claim against any party to the suit. He was therefore not a proper parry to an appeal or writ of error.

AUTHORITIES.

People vs. San Pablo, 149 U. S., 308.
Little vs. Bowers, 134 U. S., 547.
Ferguson vs. Smith, 10 Kan., 394.

Statement of the Case as to the Interpleas of T. A. Stoddard and Miller & Son:

On September 21, 1895, T. A. Stoddard filed an interplea in the trial court alleging that he as trustee for certain preferred creditors of the defendant the Campbell Commission Company, was entitled to the attached cattle, subject tc the rights of A. H. Pierce. This interplea stated the contract made by Pierce for the sale of the cattle to the defendant The Campbell Commission Company, and alleged that the real parties to said contract were A. H. Pierce on the one part and Miller & Son on the other, and that the contract was put in the name of the Campbell Commission Company to secure it

in the payment of certain debts which were owing to it by said Miller & Son. That the Campbell Commission Company had transferred its interest in said cattle to the said Stoddard as trustee to secure the payment of certain debts which were owing by the commission company and which it claimed were incurred for the benefit of Miller & Son. (Rec. 31 to 38.) On November 5, 1895, the plaintiff the Central Loan and Trust Company demurred to the interplea of Stoddard. (Rec. 43.) The attention of the court is called to the fact that the interplea of Stoddard was filed before the date of plaintiffs' motion to require said Stoddard to interplead, and that it was not filed in response to said motion or to the order made on the motion. (Rec. 30 and 31.) No action was ever taken on the interplea of Stoddard or on the demurrer interposed to the same by the Central Loan and Trust Company, and no judgment was rendered and no order was made on the interplea.

November 25, 1895, Miller & Son filed an interplea alleging that they owned the attached cattle and denying that the Campbell Commission Company or T. A. Stoddard as trustee had any interest in the same. (Rec. 44 to 46.) No answer to this interplea was filed by any of the parties to the suit and the interplea was never acted upon or brought to judgment, and no order of any kind was made upon the same. The receiver holds $22,361.64, which is not disposed of by the judgment dismissing plaintiffs' suit and which, in fact, has never been disposed of to this day.

On November 11, 1895, the defendant, the Campbell Commission Company, filed an amended plea to the jurisdiction (Rec. 43), and on December 16, 1895, said commission company substituted another amended plea to the jurisdiction (Rec. 49 and 50), which was heard by the court on the same day, to-wit, December 16, 1895, and was sustained by the

court, and plaintiffs' attachment proceedings were quashed and plaintiffs' suit dismissed. (Rec. 50 to 52.) The Central Loan and Trust Company sued out a writ of error to the Supreme Court of Oklahoma Territory, to which writ of error the Campbell Commission Company alone was defendant. (Rec. 3.) This writ of error was considered without objection by the Supreme Court of Oklahoma and the judgment of the lower court affirmed. (Rec. 54.) A motion for rehearing was filed (Rec. 65), notice of which was given to the attorneys of the Campbell Commission Company alone. (Rec. 64.) The motion for rehearing was overruled June 14, 1897. (Rec. 76.) In all the proceedings in the Supreme Court of Oklahoma Territory no objection was made to the want of proper defendants to the writ of error which was being heard in that court, and the objection is raised in this court for the first time.

FIRST PROPOSITION.

An intervenor who is not a party to a judgment cannot prosecute an appeal or writ of error, nor can anyone be made a defendant to an appeal or in a writ of error who was not a party to the judgment in the lower court.

ARGUMENT.

The plaintiff in the lower court, the Central Loan and Trust Company, sought to give the court jurisdiction of a suit on a note not yet due and at the same time to acquire a lien on certain property owned by the defendant, the Campbell Commission Company, by suing out a writ of attachment, and caused the same to be levied upon property within the jurisdiction of the trial court, the title and possession of which property was in said commission company. The interpleader Stoddard claimed the property against both plaintiff and de-

fendant but sued out no process against the defendant, and did not seek in any way to give the defendant notice, real or constructive, of his claim or to bring his interplea to the notice of the court and to secure the action of the court on the same. The same may be said of the interplea of Miller & Son. These parties filed their interpleas and did nothing further. No judgment was rendered on either interplea and no action of the court whatever was had upon the same. The right to the attached property or its proceeds was not passed upon. The interpleaders were not parties to the final judgment or to any proceedings had to reverse the same. Since no one can be made a defendant in a writ of error or a party to an appeal who was not a party to the judgment of the lower court, it follows that neither Stoddard nor Miller & Son could have been made parties to this appeal or writ of error.

AUTHORITIES.

Payne vs. Niles, 20 How., 219.

SECOND PROPOSITION.

The appeal and writ of error of the Central Loan and Trust Company applies to so much of the case and such of the parties to the suit as are necessary for the determination of the rights of the appellant and plaintiff in error.

ARGUMENT.

If the interpleaders are parties to the final judgment, still the judgment is not joint against them and the Central Loan & Trust Company. The attached property had not been disposed of and the rights of the interpleaders in the same has not been adjudicated. The only matter determined and passed upon by the judgment dismissing the suit of the Central Loan & Trust Company was the question whether said

Company could maintain its suit againt the Campbell Commission Company. The motion for rehearing was denied in the Supreme Court of Oklahoma on the 14th day of June, 1897, and an appeal was taken and notice of the appeal was given and allowed in open court at the time the judgment was rendered. (Rec. 76). At the same time the Central Loan & Trust Company in open court prayed the allowance of a writ of error to the Supreme Court of the United States and the writ of error was allowed by the Court and the amount of the supersedeas bond was fixed. (Rec. 76 and 77). Two orders are shown in the record, one on page 76 and the other on page 77, and it appears that the latter was probably a correction in some matter of form of the former.

AUTHORITIES.

Milner vs. Meek, 96 U. S., 252.

THIRD PROPOSITION.

If the Supreme Court should hold that the parties who filed interpleas in the trial court are necessary parties to an appeal or writ of error, then still the record shows the names of the interpleaders, and the defect, if any there be, can be remedied by reference to the record filed in this appeal and writ of error, and the Court will not dismiss because of such defect.

ARGUMENT.

The appellee and defendant in error the Campbell Commission Company urges that it appears from the record that there are certain parties who intervened in this suit in the trial court and who should have been made parties to the appeal and writ of error. The names of these parties are shown by the record, and the defect, if it is a defect, is in the making of

parties to the appeal and to the writ of error. This defect can be cured under the United States Statutes if it exists at all and the plaintiff in error understands the rule to be that where a defect of this character can be cured, the Supreme Court will not dismiss.

AUTHORITIES.

Rev. Stat., U. S., Sec. 10005.
Moore vs. Simonds, 100 U. S., 145.

FOURTH PROPOSITION.

Neither T. A. Stoddard, nor Miller & Son, have any legal interest in maintaining or reversing the judgment dismissing plaintiffs' suit and they are not necessary parties to a writ of error or appeal from said judgment.

STATEMENT.

Both Stoddard and Miller & Son claim the proceeds of the attached property. Such proceeds are not disposed of by the judgment dismissing plaintiffs' suit.

AUTHORITIES.

People vs. San Pablo, 149 U. S., 308.
Little vs. Bowers, 134 U. S., 547.
Ferguson vs. Smith, 10 Kan., 394.

FIFTH PROPOSITION.

Defendant in error and appellant voluntarily submitted itself to the jurisdiction of the Supreme Court of Oklahoma Territory on writ of error to that court, and if it ever had any right to question the jurisdiction of that court it has waived the same and cannot raise such question in this court for the first time.

STATEMENT.

The Campbell Commission Company submitted itself to the jurisdiction of the Supreme Court of Oklahoma Territory. It made no question in that court as to its jurisdiction. The question is first raised after the case has left the court, the jurisdiction of which is now disputed.

AUTHORITIES.

Field vs. Burton, 71 Ind., 380.

For the reasons stated the Central Loan and Trust Company, appellant and plaintiff in error, prays that the motion to dismiss filed in this cause by the Campbell Commission Company, appellee and defendant in error, be overruled.

Respectfully submitted,

WILLIAM D. WILLIAMS,
Attorney for the Central Loan and Trust Co.,
Appellant and Plaintiff in Error.

No. 145.
Brf. of Williams for Pl. in Err. & App.
Office Supreme Court, U. S.
FILED
AUG 2 1898
JAMES H. McKENNEY,
CLERK.
Filed Aug. 2, 1898.

IN THE

Supreme Court of the United States.

The Central Loan and Trust Company,
Plaintiff in Error and Appellant,

vs. No. ~~[illegible]~~ 145

The Campbell Commission Company,
Defendant in Error and Appellee.

Brief for The Central Loan and Trust Company, Plaintiff in Error and Appellant.

WILLIAM D. WILLIAMS,
Attorney for Plaintiff in Error and Appellant.

Lawrence Davis Printing Co., 709-711 Main St., Fort Worth, Texas.

IN THE

Supreme Court of the United States.

The Central Loan and Trust Company,
Plaintiff in Error and Appellant,

vs. No. 430.

The Campbell Commission Company,
Defendant in Error and Appellee.

Brief for The Central Loan and Trust Company, Plaintiff in Error and Appellant.

WILLIAM D. WILLIAMS,
Attorney for Plaintiff in Error and Appellant.

SATEMENT OF THE NATURE AND RESULT OF THE SUIT.

On the 2nd day of July, 1895, this suit was brought in the District Court of Noble County, Oklahoma Territory, by the Central Loan and Trust Company, a private corporation organized in the State of Texas, against the Campbell Commission Company, a private corporation organized in the State of Missouri, on a promissory note, executed by said Commission Company and duly transferred to said Loan and Trust Company, dated September 1st, 1894, for fifteen thousand ($15,000.00) dollars, payable two years after date with interest at

eight (8) per cent. per annum from date until paid. When the suit was filed the note sued on had not become due. (Printed Rec. 6).

On July 2nd, 1895, a summons was issued in the case for the defendant Commission Company, and on July 12th, 1895, it was returned not executed, said Commission Company not having been found within the County in which the suit was filed (Printed Rec. 10).

On July 29th, 1895, affidavit was made for service by publication (Printed Rec. 14), and a publication notice was printed notifying the defendant to appear and answer on or before September 13th, 1895 (Printed Rec. 15).

At the time of filing this suit, the Loan and Trust Company, plaintiff, applied for a writ of attachment upon the ground that the defendant, the Campbell Commission Company, was a foreign corporation and was about to sell and convey its property with the fraudulent intent to hinder and delay its creditors in the collection of their debts (Printed Rec. 7).

The judge of the District Court of Noble County, in which county said action was begun, was absent from the county and the application for an order allowing an attachment was made to the judge of the probate court of said county and the order was granted by said probate judge (Printed Rec. 8), and a writ of attachment was issued and delivered to the sheriff of Noble County (Printed Rec. 11). The sheriff levied the attachment, on July 3rd, 1895, upon five thousand (5,000) head of steer cattle, which were seized in said Noble County as the property of said defendant, the Campbell Commission Company, and were appraised at twenty-five ($25.00) dollars each (Printed Rec. 11 and 12).

On July 6th, 1895, a summons in garnishment was issued in said cause and served upon one A. H. Pierce (Printed Rec. 13 and 14), who filed an answer on August, 26, 1895, (Printed Rec. 19 et seq). and who on the same day filed an interplea in the original suit (Printed Rec. 16 et seq).

On September 31st, 1895, one T. A. Stoddard filed his interplea in said original cause (Printed Rec. 31 et seq.),

and on November 25th, 1895, George W. Miller and J. C. Miller filed their interplea (Printed Rec. 44 et seq.).

Each of the different parties who filed interpleas as above stated claim to own the cattle which had been levied upon under writ of attachment as before stated.

A. H. Pierce was appointed receiver of the said cattle (Printed Rec. 27 and 28), and sold the same under an order of the court, and the proceeds of such sale, after the payment of certain debts and expenses, amount to over $22,000.00, and are now in the hands of said Pierce as receiver, (Printed Rec. 38 et seq.).

On the 11th of November, 1895, the Campbell Commission Company filed an amended plea to the jurisdiction (Printed Rec. 43), which was still further amended on the 16th day of December, 1895 (Printed Rec. 49), and was on that day heard by the court and sustained, for reasons stated in the judgment of said court, and the attachment proceedings were vacated and the suit was dismissed (Printed Rec. 50 and 51).

The Central Loan and Trust Company took the case to the Supreme Court of the Terrritory of Oklahoma, on a writ of error (Printed Rec. 1 et seq.), and said Supreme Court held that the reasons given by the trial court for dismissing said cause were erroneous and not well taken, but the suit should have been dismissed upon another and different ground, and the judgment of the lower court was therefore affirmed (Printed Rec. 54 et seq.).

Because of the uncertainity as to the proper practice, the Central Loan and Trust Company, desiring to secure the opinion of this court, has brought the case here by appeal and upon writ of error (Printed Rec. 78 and 87).

STATEMENT OF THE QUESTIONS AT ISSUE AND THEIR ORIGIN.

This cause has never been tried on its merits, but was disposed of, both in the trial court and in the Oklahoma Supreme Court, by summary judgment of dismissal on the ground of the

alleged want of jurisdiction of the District Court of Noble County, Oklahoma Territory. The Campbell Commission Company, on the 16th day of December, 1895, filed, in this cause, in the District Court of Noble County, Oklahoma, what it termed an "amended plea to the jurisdiction" as follows, to-wit :

"Comes now the defendant, the Campbell Commission Company and, entering its appearance to this cause, specially for the purpose of this plea to the jurisdiction of the court, and for such purposes only, moves the court to dismiss this cause for want of jurisdiction of the person of this defendant, and of the subject matter of the action for the following specific reasons, to-wit :

First. Under the organic act of the Territory, the court cannot acquire jurisdiction of the person of this defendant by constructive service by foreign attachment without its consent.

Second. Because there is no basis for service by publication herein, for the reason that all the attachment proceedings are void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due.

Third. Because there has been no seizure of any of defendant's property within the jurisdiction of this court, either by attachment or garnishment process, and reference is hereby made to the answer of A. H. Pierce, garnishee, which said answer discloses the fact that the defendant has and had no interest in the property attempted to be seized and garnisheed in this cause, and—which said—disclosing such facts said plaintiff never joined issue, nor served any notice of taking issue on such answer. Whereby the said answer became and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service.

Fourth. Because the pretended seizure of said property is void as a basis of jurisdiction, because there was no actual or constructive service of any attachment or garnishment order on this defendant.

Fifth. Because the affidavit for service by publication is wholly insufficient to authorize such service.

Sixth. Because the pretended notice by publication is insufficient because it does not comply with the law and because the same was not published as required by law.

Seventh. Because the pretended order of attachment and garnishment are void for the reason that no undertaking was given by the plaintiff therefore, and because the record discloses that the debt sued upon was not due and all pretended seizures were void under such writs by reason thereof (Printed Rec. 49 and 50).

This plea was an amendment to and stood in the stead of a plea to the jurisdiction filed by said defendant, the Campbell Commission Company, in this cause on the 11th day of November, 1895, and set out on pages 43 and 44 of the printed record.

On the 16th day of December, 1895, being the day on which the amended plea to the jurisdiction was filed, the trial court proceeded to hear the amended plea to the jurisdiction and rendered judgment as follows, to-wit:

"Now, on this 16th day of December, 1895, said cause coming on to be heard on the plea of said defendant, the Campbell Commission Company, to the jurisdiction of the court, and the plaintiff appearing by Messrs. Harris & Lafferty, its attorneys, and the defendant appearing specially by Messrs. Asp, Shartel & Cottingham, its attorneys, and thereupon the plaintiff objected to the consideration of said motion because the same is filed after the time specified in the publication notice for answer, and that said defendant denied any interest in the attached property, and that said motion is not sufficient in form and substance to raise any question for the consideration of this court; which objection is by the court overruled; to which ruling the plaintiff duly excepted, and thereupon the defendant, by leave of court, filed an amended plea to the jurisdiction by adding and substituting the following ground, to-wit: "Second. Because there is no basis for service by publication herein, for the reason that

all the attachment proceedings are void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due;" and thereupon the said plea and motion was duly argued by counsel for the parties, and the court, being fully advised in the premises, overrules the said motion upon the following grounds stated in said amended motion, to-wit: first, third, fourth, fifth, sixth and seventh; to which said ruling of the court overruling the said motion upon said grounds stated in the said amended plea to the jurisdiction, the said defendant duly excepted and excepts."

"And the court, after hearing the argument of counsel, and being further duly advised in the premises, sustains said motion and plea upon the second ground stated in said amended motion and plea, to-wit: "Because there is no basis for service by publication herein for the reason that all the attachment proceedings are void for want of power of the probate judge to grant the attachment on the plaintiff's demand before the same was due."

"The court holding, as a matter of law, that the act of the Territory Assembly of the Territory of Oklahoma, attempting to confer power upon the probate judge to grant attachments upon debts before due, upon absence of the district judge from said court, is unconstitutional and void.

"And it is, therefore, by the court considered, ordered and adjudged that the said plea to the jurisdiction be and the same is hereby sustained upon the second ground therein stated as aforesaid and is overruled on each and all of the other grounds stated in said plea; to which ruling, overruling said plea to the jurisdiction of the court in part, the said defendant duly excepted and excepts, and to which said ruling, sustaining said plea to the jurisdiction upon the second ground, the said plaintiff duly excepted and excepts.

"It is, therefore, by the court considered, ordered and adjudged that the attachment proceedings in this matter are null and void, and of no effect, and that the same are hereby dis-

charged, vacated and held for naught; to which the said plaintiff duly excepted and excepts.

"And it is further considered, ordered and adjuged that, by reason of the nullity of the said attachment proceedings, the attempted service by publication in this matter upon the defendant, the Campbell Commission Company, is null and void and of no effect, and the court has no jurisdiction to hear and determine this cause; to which the plaintiff duly excepted and excepts.

"And it is, therefore, by the court considered, ordered and adjudged that this action be and the same is hereby dismissed for want of jurisdiction without prejudice as to the defendant, the Campbell Commission Company, and that the plaintiff pay the cost in this action, taxed at $———.

"Hereof, let execution issue; to which said order vacating and discharging said attachment, the said plaintiff duly excepted and excepts, and to which said order dismissing said cause at the cost of said plaintiff, for want of jurisdiction, the said plaintiff also duly excepted and excepts" (Printed Rec. 50 and 51).

The cause was then taken by writ of error to the Supreme Court of Oklahoma Territory, and that court, in its opinion which is set out in the printed record on pages 54 to 64, holds: First. That the trial court erred in holding unconstitutional and void the act of the Territorial Assembly of the Territory of Oklahoma, conferring power upon probate judges of that territory to grant attachments upon debts not due, in the absence from the county of the district judge, and that the attachment in this case was granted in a legal and constitutional manner and by one having due authority. Second. That there had been no personal service of summons upon the Campbell Commission Company, within Oklahoma Territory, and said Company was not resident within said Territory, and the court was without jurisdiction of the person of said defendant Company, and that it appeared from an answer in garnishment, filed by a garnisher, one A. H. Pierce, as entertained in the record, that the said defendant was not the owner

of the attached property, for which reason the court had no jurisdiction of such property, and that the court, having no jurisdiction of either the person of the defendant or of the attached property, could proceed no further (Printed Rec. 62, 63 and 64).

The Territorial Supreme Court, having announced its views upon the facts and law of the case, affirmed the judgement of the trial court (Printed Rec. 64).

STATEMENT OF FACTS MATERIAL TO THE ISSUES OF LAW.

The petition alleges that the said defendant Commission Company is a Missouri corporation (Printed Rec. 6), and the affidavit for attachment alleges that said defendant is a foreign corporation, organized under the laws of the State of Missouri (Printed Rec. 7).

Summons for the defendant, the Campbell Commission Company, issued out of the trial court, July 2nd, 1895, the day this suit was filed, and was returned July 12th, 1895, not served, the said defendant not having been found (Printed Rec. 10).

On July 29th, 1895, the plaintiff, the Central Loan and Trust Company, filed its affidavit for publication of summons, alleging therein that said defendant Commission Company was a foreign corporation, having within the Territory no officer or agent upon whom service of summons could be had, and that, after due diligence, plaintiff had been unable to make service of summons on defendant (Printed Rec. 14 and 15).

Service was had by publication of notice, and, in this manner alone, defendant was notified to answer plaintiff's petition on or before September 13th, 1895 (Printed Rec. 15 and 16).

The only pleadings filed by the Campbell Commission Company, defendant, were its plea and amended plea to the jurisdiction (Printed Rec. 43 and 49).

At the same time with the filing of its petition, the Central

Loan and Trust Company, plaintiff, filed its affidavit for attachment (Printed Rec. 7), and its application to the probate judge for an order granting a writ of attachment (Printed Rec. 8), and on the same day said probate judge ordered that an attachment be granted (Printed Rec. 8) and the writ of attachment was issued (Printed Rec. 11).

This writ of attachment was placed in the hands of the sheriff of Noble County, July 3rd, 1895, and on the same day said sheriff levied said writ upon five thousand head of cattle, of the appraised value of twenty-five dollars per head, which were found in Noble County and were taken by virtue of said writ as the property of the defendant, the Campbell Commission Company (Printed Rec. 11 and 12).

On the 6th of July, 1895, the Central Loan and Trust Company, plaintiff, filed in the trial court its affidavit for garnishment (Printed Rec. 13), and on the same day a summons in garnishment issued to one A. H. Pierce, as garnishee, and was served upon him and returned to and filed in the trial court. This summons required the garnishee to answer on or before August 26th, 1895, whether he was indebted to, or had in his possession or under his control any property belonging to the defendant, the Campbell Commission Company (Printed Rec. 13 and 14).

On the 26th of August, 1895, the garnishee, Pierce, filed his answer in garnishment (Printed Rec. 19 to 23) in which he denied all indebtedness to the said defendant, the Campbell Commission Company, and averred that he had in his possession no property, real or personal, belonging to said defendant, and that he was in no manner liable as garnishee. Having thus fully answered the writ, he "for further and special answer" set forth a copy of a written contract which, he alleged, had been entered into on the 8th of September, 1894, by himself on the one part, and the defendant, the Campbell Commission Company, on the other. The contract, as set forth in the answer of said garnishee, is as follows, to-wit:

"It is distinctly understood and agreed by the parties hereto that the title of said steers shall be and remain in the party

of the first part, until the sum of fifteen dollars per head is fully paid by the party of the second part to the party of the first part, for each and every steer delivered on board the cars at Pierce Station, Texas, for shipment to the party of the second part. This amount of fifteen dollars per head is to be paid for each steer so delivered net to the party of the first part, the freight and all other expenses to be paid by the party of the second part, in addition to the sum of fifteen dollars per head.

"It is further agreed and understood by the parties hereto, that the party of the first part may put a man with said steers as his agent, in the pasture of the second party, to represent his interest in said steers; said man to be paid fifty dollars per month by the said party of the second part, from the date of shipment of said steers from Pierce Station, Texas, until said steers shall have been shipped to market or fully paid for, and also furnish him horses to ride and board and lodge him free of cost to the party of the first part, during his stay with said steers. Said man is to look exclusively after said herd of cattle, and to obey the instructions of the party of the second part. The sum of five thousand dollars is hereby paid by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part at the signing of this agreement, as part of the purchase price.

"The party of the second part agrees to pay the party of the first part interest at the rate of 10 per cent. per annum on all unpaid amounts, from the date of the shipment of said cattle from Pierce Station, Texas, until full and final payments are made in accordance with this agreement.

"It is further understood and agreed that the party of the second part has the right to select from these above mentioned steers ten or twelve hundred, for the purpose of feeding the same on or before November 1st, 1894, which are to be fed in the Holt pasture at Matagorda County, Texas; and when they were ready for shipment, the party of the second part is to pay to the party of the first part the amount of fifteen dollars per head before they are put on board the cars for shipment.

"It is understood that the cattle are to be delivered for the purpose of feeding, and are to be branded at the time of delivery, with the letter "C," and that said party of the second part is to furnish branding irons, the party of the first part to do the branding.

"This contract, signed in duplicate, this 8th day of September, 1894, at Kansas City, Mo.

"*Attest:* "A. H. PIERCE.

"WM. ALBRITAIN, "CAMPBELL COMMISSION CO.,

"HENRY WITHERS, By "JAMES H. CAMPBELL, PRES."

(Printed Rec. 19 to 21).

After setting out the contract as above, the answer of said garnishee, Pierce, alleged the delivery of said cattle on board cars at Pierce Station, Texas, and their shipment, under said cantract, to the pasture of the defendant Commission Company in the Indian Territory, and that there were in said pasture about 5,000 head of cattle covered by said contract when this suit was filed, and when summons in garnishment was served on said garnishee, and that plaintiff had "endeavored to levy its said attachment and garnishment on said five thousand head," and that said 5,000 head of cattle were at the time of filing said answer, and always had been in garnishee's possession. That at the time of the execution of said contract, the Campbell Commission Company paid garnishee five thousand dollars, as required by the terms of said contract, but that the balance of the purchase money for said steers was wholly unpaid, and garnishee had been compelled to pay expenses on said cattle, "aggregating about the sum of ———dollars," because of the failure of the defendant Commission Company to pay the same, as by the terms of said contract it should have done (Printed Rec. 21 and 22).

That 2,000 of said 7,000 steers were fed in pastures in Texas, and were marketed and sold, and after sale about $1,400.00 remained owing to garnishee on their purchase price, upon which it was agreed between garnishee and defendant Commission Company that said sum of $1,400.00 should be a

charge against the 5,000 steers in the Indian Territory, and title to said 5,000 steers should not pass from garnishee to defendant until garnishee had been paid all the amounts owing him as aforesaid (Printed Rec. 22).

Garnishee further avers that before July 6th, 1895, he received notice of the assignment of said contract by the defendant Commission Company to one T. A. Stoddard, as trustee for sundry creditors of said defendant, but garnishee does not attempt to state when said assignment was made. That on July 12th, 1895, the United States Circuit Court for the Western Division of the Western District of Missouri appointed George E. Black and George A. Neal, joint receivers of the defendant Commission Company, and all the assets and property of said Company were placed in the hands of said receivers (Printed Rec. 22 and 23).

This answer in garnishment was not controverted by plaintiff, nor was any notice given the garnishee by the plaintiff that plaintiff had elected to take issue with garnishee upon the answer of the latter.

On the same day on which his answer in garnishment was filed, to-wit: On said 26th of August, 1895, said A. H. Pierce filed his interplea in this suit in the trial court claiming that plaintiff had seized and taken from him 5,000 head of cattle, and that he was then entitled to the immediate possession of the cattle which had been seized and were being held by the sheriff under plaintiff's writ of attachment, and that said cattle were being wrongfully withheld from him, but said Pierce does not in said interplea state that he owns said cattle and his said interplea, which is sworn to, says that said cattle have been taken from him, and, to this extent, contradicts his own answer in garnishment (Printed Rec. 16 and 17).

On the 25th of November, 1895, the plaintiff, the Central Loan and Trust Company, filed its answer to the said interplea of said A. H. Pierce, denying all the alligetions of said interplea, and alleging that said Pierce had waived and abandoned all his interest and claim in the cattle taken under plaintiff's attachment, except such as he held as receiver

under appointment from the trial court, as is herewith fully set forth (Printed Rec. 47).

On September 7th, 1895, the Central Loan and Trust Company, plaintiff, filed in the trial court its application for the appointment of a receiver to take charge of and hold the attached property and to sell the same (Printed Rec. 24 and 25), and, on the 9th of September, 1895, the trial court appointed A. H. Pierce, who had filed the before mentioned answer in garnishment and interplea, receiver without bond of said attached cattle, and ordered him to sell the same in accordance with the terms of his said contract with the said defendant, the Campbell Commission Company, and out of the proceeds to pay himself the amount owing him on the said contract, and to hold the balance subject to the further orders of the court (Printed Rec. 27 and 28).

On the 13th of September, 1895, said Pierce filed a written acceptance of the office of receiver under the appointment of the court, and took the oath of office and qualified as receiver (Printed Rec. 29), and on the 14th of September, 1895, he received the attached cattle and receipted the sheriff for the same (Printed Rec. 38), and afterwards filed in court his report as receiver showing he had sold said cattle, and out of the proceeds had paid all expenses of holding and selling the same, and had retained all sums coming to him under his said contract and agreement with the defendant Commission Company, and that after deducting said expenses and the amount paid to himself, he had a balance left in his hands of $22,-361.64, which was the net proceeds of the cattle, after the payment of all expenses and of all sums owing the said Pierce by said defendant, the Campbell Commission Company, and which balance he, the said Pierce, held as receiver, subject to the orders of the trial court in this cause (Printed Rec. pages 38 to 42. See page 42 for balance on hand). The claim made by Pierce in his answer in garnishment had been settled and extinguished in this manner, and said balance of $22,-361.64 remained in the hands of the receiver subject to plaintiff's attachment and to the claims of the interpleaders other

than Pierce, and was in the hands of said receiver when the cause was dismissed by the trial court, and when this judgment was, on a different ground, affirmed by the Territorial Supreme Court, and the said receiver still holds said balance.

On the 21st of September, 1895, one T. A. Stoddard filed an interplea in said cause, and after setting out the contract between the garnishee and receiver, Pierce, and the defendant, the Campbell Commission Company, as the same had before that time been set out by said Pierce in his answer in garnishment, and as said contract is copied in this brief, alleges that Geo. W. Miller and J. C. Miller, partners doing business under the same firm name, Geo, W. Miller & Son, were indebted to the defendant, the Campbell Commission Company, in a large sum of money, and procured said Commission Company to make said contract with said Pierce for the use and benefit of said Miller & Son. That in order to secure said defendant Commission Company in the payment to it, out of the anticipated profits on said contract, of the amount owing it by said Miller & Son, and of amounts needed to carry out said contract and to pasture and market said cattle, which latter amounts defendant was to secure and borrow for said Miller & Son, said contract was taken in the defendant's name. That the defendant Commission Company became indebted to the sundry persons and corporation for whom the interpleader, Stoddard, was acting as trustee, and that said debts were for the benefit of said Miller & Son, or were secured by collateral notes of said Miller & Son payable to said defendant Commission Company. That on July 1st, 1895, and before the filing of this suit, the defendant Commission Company assigned to said Stoddard, as trusteee for said creditors of said defendant, all its interest in its said contract with said Pierce. That Pierce, as receiver, had sold said cattle and had a large balance of proceeds remaining in his hands, which money said Stoddard claimed to own as trustee (Printed Rec. 31 to 38).

On November 25th, 1895, George W. Miller and J. C. Miller, partners composing the firm of George W. Miller &

Son, filed their interplea in this cause, alleging that said contract was made for their sole benefit, and that the Campbell Commission Company had no interest therein, and had executed a transfer of said contract to one T. A. Stoddard, as trustee, without any right or authority whatever. That Miller & Son were the sole owners of the attached cattle and of the proceeds of the same in the hands of Pierce, as receiver. The prayer of the interplea is that Miller & Son have judgment for the proceeds of said attached cattle, after the payment of the claim of said Pierce and of the expenses of the receiver and costs of court (Printed Rec. 44 to 46).

With the record in this condition, the defendant, the Campbell Commission Company, filed its "amended plea to the jurisdiction," a copy of which is to be found on pages 4 and 5 of this brief, and on the day on which it was filed, December 16th, 1895, the trial court took up this "amended plea" and sustained the same on the second ground, which complains that the act of the territorial legislature, granting power to a probate judge to order an attachment in the absence of the proper district judge, is unconstitutional and void, and that since the attachment in this case was granted or ordered by a probate judge, it must, therefore, be vacated, and as there was no personal service of process and no property had been legally seized, the court was without jurisdiction, and the suit must be dismissed. A copy or the order of the trial court dismissing the cause and vacating plaintiff's attachment is printed on pages 5 to 7 of this brief.

Defendant's "plea to the jurisdiction" is substantially a motion to dismiss. Six grounds or reasons are assigned in support of the pleading. The trial court sustained the second ground of this motion, the substance of which is as stated above, and overruled all other of the grounds of the motion or plea, including the third. The Supreme Court of the Territory overruled the second ground of the motion but sustained the motion on the third ground.

The third ground of the plea or motion is that it appears, from the answer in garnishment of the garnishee, A. H. Pierce,

"that the defendant had and has no interest in the property attempted to be seized and garnisheed in this case," and plaintiff, having failed to join issue with said answer, the same conclusively establishes the fact that none of defendant's property has been attached (Supra, p. 4).

The part of the opinion of the Supreme Court of the Territory which sustains the third ground of the defendant's "plea to the jurisdiction," reads as follows, to-wit:

"The conclusion we have reached on this point necessitates our consideration of the other proposition presented in defendant in error's special plea to the jurisdiction of the district court, viz., that said court had no jurisdiction because no actual service had been had upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process. The record shows that there was no personal service on defendant. The answer of the garnishee showed that the property seized under the writ of attachment issued was in the possession of the garnishee and held by him under a vendor's lien; that by the terms of the contract creating such lien, title to the property was not to pass to the defendant, but was to remain in the garnishee until the terms of said contract had been complied with by the defendant; that defendant at the time of the service of the garnishment had no interest whatever in said property, having transferred and assigned whatever interest he might have had, by virtue of said contract, to one Stoddard, in trust, and to be applied in the payment of certain of his debts, amounting to more than any interest which he might have had in said property. Section 4085, Statutes of Oklahoma, 1893, provides:

"The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall, within twenty days, serve upon the garnishee a notice in writing that he elects to take issue on his answer, in which case the issue shall stand for trial as civil action, in which case the affidavit on the part of the plaintiff shall be

deemed the petition, and the garnishee's affidavit the answer thereto."

No notice having been given to the garnishee by the plaintiff of his intention to take issue on the garnishee's answer, in this cause filed, and no issue having been made thereon under the foregoing provision of the statute, such answer must be taken as conclusive of the truth of all the facts stated therein, and such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached, and that no debts or liabilities were owing to him by such garnishee, and that whatever interest he might have had in such property had, before the garnishment, been lawfully assigned and conveyed to Stoddard. Was there, then, any constructive service against the defendant in the cause by attachment or garnishment? A garnishment, to have any force or effect, must reach and bind some property of the defendant or some debt due to him. Where property is sold and delivered upon condition that the title shall not vest in the vendee unless the price agreed upon be paid within a specified time, the vendee has no attachable interests in the property until the performance of the condition.

Drake on Attachment, section 246.
Buckmaster vs. Smith, 22 Vt., 203.
McFarland vs. Farmer, 42 N. H., 386.
19 Federal Reporter, 760.
Lucas vs. Birdsey, 41 Conn., 357.
Bradshaw vs. Warner, 54 Ind., 58.
Freeman on Judgments, Sec. 124.
Strong vs. Taylor, 15 N. Y. (Hill), 325.
Sage vs. Sleutz, 23 Ohio St., 1.
Cardinal vs. Edwards, 5 Nev., 40.
Harkness vs. Russell, 118 U. S., 671.

Where completion of contract is a condition precedent to payment the payor is not garnishable on his debt before the contract is completed (Carley vs. Bertran, garnishee, 34 N. W., 674). An answer showing that the debtor has assigned to a third party his interest in the property or in the debt due

from the garnishee, and has notified the garnishee, sets up a state of facts showing that the garnishee is under no legal liability to the debtor (Bailey vs. Union Pacific R'y. Co., garnishee, 17 N. W., 567).

The contention of plaintiff in error, that the defendant in error's plea to the jurisdiction in the court below, was a general appearance of the defendant in action and gave jurisdiction, cannot be sustained. In order to constitute a general appearance the defendant must file some plea which in effect admits the jurisdiction of the court. The plea in this cause did not go to the merits of plaintiff's cause of action or his right to sue thereon, but was simply an assertion that the defendant was not in court, and that the court held no jurisdiction of his person or his property, because there had been no service of process, either upon him personally or so as to affect any property owned by him.

We must therefore conclude that, when the answer of the garnishee was filed, and the same was not traversed within the time provided for by law, such answer was conclusive as to the facts therein stated, namely, that no property belonging to the defendant in error or debts due to him was reached by such garnishment, and as no other property of the defendant was seized under the attachment and there was no personal service upon the defendant, the court had acquired no jurisdiction and was without jurisdiction to proceed further; that all the subsequent proceedings, orders and decrees therein, except the order dismissing said cause, were *coram non judice* and void. As the court below entered a final order dismissing the cause was (for?) want of jurisdiction, although not upon grounds herein approved, the judgment below was for the right party and said judgment is affirmed (Printed Rec. 62 to 64).

Thereupon the Central Loan and Trust Company moved a rehearing (Printed Rec. 65 et seq.), and this having been refused on the 14th of June, 1897 (Printed Rec. 76), the cause was brought to this court by appeal and writ or error.

ASSIGNMENT AND SPECIFICATIONS OF ERROR.

The Central Loan and Trust Company has filed assignments of error both on appeal and on writ of error, and the assignments in the one case are identical with those in the other. Only such assignments will be printed in this brief as are relied upon, and all assignments not printed are to be taken as having been waived and abandoned.

The assignments of error relied upon are as follows, to-wit:

Third. The court erred in considering the question of the jurisdiction of the trial court over the property of the defendant in error or the ownership of the property attached in the proceeding, when the same was not assigned as error or in any manner presented to the court for consideration or determination.

Fourth. The court erred in holding that the motion of defendant in error to set aside the attachment for the want of jurisdiction over the property of the defendant could be considered as an attack upon the service by publication.

Fifth. The court erred in holding that the affidavit of the garnishee could be considered as evidence, showing conclusively that the property attached was not the property of the defendant in error.

Sixth. The court erred in holding that the answer of the garnishee could be considered for any purpose other than as showing his liability or non-liability to the defendant in error at the time of the service of garnishment summons upon the garnishee.

Seventh. The court erred in considering the claim and contention of defendant in error that it was not the owner of the property attached.

Eighth. The court erred in considering defendant in error's plea to the jurisdiction of the district dourt, set out in the following language: "That said court had no jurisdiction, because no actual service had been made upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by atiach-

ment or garnishment process," said quession and proposition not being presented to the court in the brief or argument, or assigned as error.

Ninth. The court erred in holding that in the absence of notice in writing of plaintiff in error's election to take issue on the answer of the garnishee, the garnishee's answer became conclusive "of the truth of all facts stated therein," and that "such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached," and, in the same connection, the court erred in holding "that when the answer of the garnishee was filed, and the same was not traversed within the time provided by law, such answer was conclusive as to the facts therein stated, viz.: 'that no property belonging to the defendant in error had been attached.' "

Tenth. The court erred in ignoring the return of the sheriff showing that he had attached the property of the defendant, and in ignoring the further proceedings in the cause showing that the property had been sold as the property of the defendant, and that the proceeds were then in the hands of the receiver appointed by the court to abide the determination of the court in the case.

Eleventh. The court erred in considering the answer of the garnishee, with reference to the ownership of the property, as sufficiently establishing the fact of ownership, and overthrowing the return of the officer upon the writ of attachment.

Twelfth. The court erred in ignoring the fact that the garnishee, who had interpleaded in the action, charged under oath that the property had been seized by the sheriff and taken out of his possession, and the further fact that the garnishee, after filing said interplea, abandoned all claim to the property and accepted the appointment as receiver for the court.

Thirteenth. The court erred in disposing of the rights of the plaintiff in error, as well as Stoddard, Miller & Son, and A. H. Pierce, interpleaders, on the *ex parte* statement of the garnishee as to the ownership of the property in litigation.

Fourteenth. The court erred in holding the answer of the

garnishee sufficient to affect and determine the rights of the plaintiff in error and the intervenor in the action, and sufficient to deny such parties the right of trial by jury of the question of ownership of the property in litigation.

Sixteenth. The court erred in holding that the construction which was placed upon the contract, set out in the garnishee's answer by the garnishee himself, was binding upon the court as the proper construction of the contract, and in not referring to and considering the contract itself in determining its real meaning and legal force and effect.

Seventeenth. The court erred in holding that the contract set out in the answer of the garnishee created a vendor's lien upon the property in favor of the garnishee and was at the time by its terms a conditional sale of the property by which title was not to pass to the defendant, but was to remain in the garnishee.

Eighteenth. The court erred in holding that the contract set out in the answer of the garnishee had any greater force or effect than a chattel mortgage or lien to secure the payment of the purchase price of the property therein described.

Nineteenth. The court erred in holding that the answer of the garnishee could be considered as establishing the ownership of the property in himself after he had abandoned and waived his claim of owneship and possession.

Twentieth. The court erred in holding that the contract between the garnishee and the defendant in error, set forth in the answer of the garnishee, was an executory contract of sale by which no title to or interest in the property passed to the defendant in error, at the same time holding that the rights and interests of the defendant in error in the same property had been assigned to Stoddard, by reason of which there was no liability of the garnishee to the defendant in error.

Twenty-first. The court erred in holding that the defendant could assail the validity of the attachment on the ground that it was not the owner of the property attached.

Twenty-second. The court erred in sustaining the indirect attack of the defendant in error upon the attachment on the

ground that it was not the owner of the property, by considering the attack as one directed to the service, the sufficiency of which depended upon the attachment (Printed Rec. 79 to 81 and 87 to 89).

BRIEF AND ARGUMENT.

Section 4120 of the Oklahoma Statutes of 1893, relating to civil procedure, under which plaintiff's action in this cause was brought, provides that, under certain circumstances, an action may be filed on a claim before the claim is due and an attachment may be issued against the property of the defendant. The section reads as follows, to-wit:

"Section 4120. Where a debtor has sold, conveyed or otherwise disposed of his property with fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor."

Section 4120 of said statutes provides how an attachment may issue in an action on a claim which is not yet due, and, among other things, provides that in the absence of the district judge an order of attachment on such a claim may be granted by the probate judge in the county in which the action is brought. Plaintiff's action was filed in Noble County, Oklahoma Territory, and, the district judge of that county being absent, application was made to the probate judge who issued the order of attachment (Supra p. 2). Section 4121 reads as follows, to-wit;

Section 4121. The attachment authorized by the last section may be granted by the court in which the action is

brought, or by the judge thereof, or in his absence from the county, by the probate judge of the county in which the action is brought; but before such action shall be brought, or such attachment shall be granted, the plaintiff, or his agent or attorney, shall make an oath in writing, showing the nature and amount of the plaintiff's claim, that is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section.

The provisions vesting the judicial power of the courts of Oklahoma Territory, as the same are contained in the organic act, or act of Congress creating the Territory, are as follows, to-wit:

"That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts and justices of the peace. The jurisdiction of the several courts herein provided for, both appellate and Original, and that of the probate courts and of the justices,of the peace, shall be as limited by law; *Provided*, that justices of the peace, who shall be elected in such manner as the Legislative Assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States or of the Territory, affecting persons or property. The said supreme and district courts of said Territory and the respective judges thereof shall and may grant writs of mandamus and habeas corpus in all cases authorized by law."

The motion to dismiss of the defendant, the Campbell Commission Company, is set out in this brief (Supra p. 4).

Upon the hearing of said motion, the trial court held that the act of the Territorial Assembly attempting to confer power upon probate judges to grant attachments upon debts not due was unconstitutional and void, and since the attachment in this

suit had been ordered by a probate judge the trial court vacated plaintiff's attachment and dismissed its action,

The Supreme Court of Oklahoma Territory, reviewing the judgment of the trial court, held that the act of the territorial legislature, granting power to probate judges to issue orders of attachment in the cases and under the circumstances stated above, was constitutional, and that the trial court erred in holding the contrary. The Supreme Court then proceeded to consider the third ground assigned by the Campbell Commission Company in support of its motion to dismiss, and held plaintiff's attachment void, because, in its opinion, no property belonging to the defendant in attachment had been seized under said attachment, and, there having been no personal service upon the defendant, the trial court was without jurisdiction to render a personal judgment against the defendant, or to condemn any of its property for the payment of the debt sued upon by plaintiff.

The conclusions reached by the Supreme Court of the Territory, necessarily involve each of the following propositions, to-wit:

1. That where property has been seized under a writ of attachment and the officer executing the writ endorses his return thereon, showing that he has seized certain property belonging to the defendant, and returns the writ so endorsed into court, it is competent for the defendant upon a motion to dismiss, to deny the ownership of the attached property.

2. That where the question of the ownership of attached property is raised by a motion to dismiss, it may be disposed of at the hearing of such motion without the formality of a trial, and without regard to the joinder or non-joinder of issue upon this question by the pleadings of the parties, and without the introduction or consideration of evidence.

3. That the official return on a writ of attachment may be attacked upon a motion to dismiss the action, and that no motion to vacate the return, and no direct attack thereon need be made.

4. That an uncontroverted answer in garnishment is con-

clusive evidence against the plaintiff, not only in the garnishment proceedings but also in the action to which the garnishment is ancillary.

5. That in a motion to dismiss an action where the ground of the motion is that the attached property does not belong to the defendant, an uncontroverted answer in an ancillary garnishment is of greater value as evidence than is the positive oath of the garnishee in the original action, even when combined with the official return upon an executed writ of attachment and reports officially made by the garnishee as receiver of the court.

6. That the question as to the ownership of attached property may be considered in an appellate court, although not assigned as error or in any manner presented for consideration or determination, and although no trial of said issue was had, and no evidence thereon was introduced, and no opportunity for its introduction afforded in the trial court.

In addition to these propositions, there are several others which will be referred to in their proper order, but which do not so apparently arise from the statement of the case heretofore made in this brief. The Central Loan and Trust Company, plaintiff in error and appellant, will attack each one of the propositions hereinbefore set out, and will attempt to show that none of them are well taken. In doing this, appellant and plaintiff in error will first announce a proposition of law which it believes antagonistic to the position necessarily taken by the Supreme Court of the Territory, and this will be followed by a brief statement of the facts necessary to an understanding of the proposition and of its applicability, and this statement will, in its turn, be followed by a list of authorities and, at times, by a short argument,

FIRST PROPOSITION.

Where property has been seized under a writ of attachment, and the officer executing the writ endorses his official return thereon, showing that by virtue of said writ he has seized property belonging to the defendant, and the writ as endorsed has been duly returned into court, it is not competent for the defendant, upon a motion to dismiss the attachment suit, to deny the ownership of the property.

STATEMENT.

This suit was brought by the Central Loan and Trust Company as plaintiff against the Campbell Commission Company as defendant, upon a debt which was not due at the time suit was filed, and under the laws of Oklahoma Territory the suit could be instituted and maintained as an attachment proceeding only, and for the purpose of impounding and holding defendant's property until the maturity of the debt owing to the plaintiff. That this is the meaning and intent of the Oklahoma statutes is made clear by the language of Section 4122 of the statutes of 1893 relating to civil procedure, which reads as follows, to-wit:

"*Section 4122.* If the court or judge refuse to grant an order of attachment, the action shall be dismissed, bnt without prejudice to a future action; and in all such actions, application for an attachment must be made."

Writ of attachment was sued out, issued, placed in the hands of the sheriff of the couty in which the suit was filed, and was by said sheriff levied upon five thousand (5,000) head of cattle which the sheriff states in his official return was the property of the defendant Campbell Commission Company, and which was appraised at twenty-five ($25.00) dollars per head (Printed Rec. 11 and 12). The attachment was levied on the 3rd day of July, 1895, and the property attached remained in the hands of the sheriff until the 7th

day of September, 1895, at which date A. H. Pierce was appointed receiver of said property (Printed Rec. 27 and 28).

Before that time on the 6th of July, 1893, the said A. H. Pierce was summoned as a garnishee in said cause (Printed Rec. 13 and 14), and on the 26th of August, 1895, the said Pierce filed in said court his answer as garnishee, and in this answer stated that he was not indebted to the Campbell Commission Company, and that he had no personal property or effects of said Company in his possession and was in no manner liable as garnishee. The garnishee then proceeded to set out a contract between himself and the Campbell Commission Company, dated September 8th, 1894, (See supra, pages 9 to 11, for copy of same), whereby the said garnishee, Pierce, agreed, within a certain time and at a certain place specified therein, to gather and put on board cars certain steer cattle which the Campbell Commission Company agreed to take charge of at the shipping station, and on board the cars and at its own expense and risk to ship to its pastures in the Indian Territory, and to handle and attend to said cattle until the summer or fall of 1895, at which time it was to ship the steers to market for the account of said Pierce. The contract contained an agreement that the title should remain in Pierce until the cattle had been paid for at the rate of fifteen ($15.00) dollars per head, of which amount the contract acknowledged receipt by Pierce of five thousand ($5,000.00) dollars having been paid at or before its execution and provided that the Campbell Commission Company should pay interest on the balance of the purchase price from the date of the shipment of the cattle at the rate of ten per cent. per annum. The answer in garnishment further stated that seven thousand head of cattle had been delivered under the contract, of which number two thousand head were sold to the Campbell Commission Company, in Wharton County, Texas, and five thousand head had been shipped to the pasture of the Campbell Commission Company in the Indian Territory, and were now and had always been in the possession of the garnishee, Pierce, but plaintiff had endeav-

ored to levy its attachment on said cattle. That the garnishee had never received payment for said five thousand head of cattle except to the extent of the five thousand ($5,000.00) dollars mentioned the contract. That about fourteen hundred ($1,400.00) dollars was owing to the garnishee on said two thousand head of cattle held in Wharton Couty, Texas, and that it had been agreed between garnishee and the Campbell Commission Company that this fourteen hundred ($1,400.00) dollars was to be a charge against the five thousand head of cattle in the Indian Territory. The garnishee further stated in his said answer that, prior to the service of the garnishment summons, he had been notified of a transfer having been made by the Campbell Commission Company, dated July 1st, 1895, transferring its entire interest in said cattle to one T. A. Stoddard as trustee for certain creditors but the answer in garnishment does not aver that this transfer was executed on the day of its date or at any time before the day of plaintiff's attachment. The answer further states that on the 12th day of July, 1893, a receiver of the assets and property of said Campbell Commission Company was appointed by a decree rendered in the United States Circuit Court for the Western Division of the Western District of Missouri, and that said decree remained at the date of the answer in full force and effect. Having stated these facts the garnishee prayed that he be discharged from garnishment, and that he be allowed his expenses and a reasonable attorneys fee for making his answer and defending the action against him as garnishee (Printed Rec. 19 seq.)

This answer in garnishment was filed in court on the 26th day of August, 1895, and on that day the same person, A. H. Pierce, filed an interplea in the original cause (Printed Rec. 16 et seq.), in which he avers that said five thousand head of cattle had been wrongfully taken from him, and were being wrongfully detained from his possession, under and by virtue of plaintiff's writ of attachment, while the answer in garnishment states that said cattle were and always had been in the possession of the said Pierce. This interplea was sworn to on

the 22nd of August, 1895, and the answer in garnishment was sworn to on the 24th of August, 1895, both affidavits having been made before the same officer, and one containing a positive statement that plaintiff had possession of the attached property, and the other a positive statement that the property had been taken away from him under plaintiff's attachment.

Pierce was appointed receiver at plaintiff's application and as the result of an agreement that he should have this means of handling the cattle to the best possible advantage, and of getting out of them the money to which he was entitled under his contract, which Pierce said was all that he cared to claim and all that he wished to get. The order appointing Pierce receiver of said cattle directs him to proceed with the sale of same and retain, out of the moneys received for said cattle, the full amount owing him under the terms of his contract with the defendant, the Campbell Commission Company, as set forth in his answer in garnisnment. The remainder of the proceeds of said cattle, said Pierce was ordered to hold subject to the order of court (Printed Rec. 27 and 28).

Pierce took possession of the cattle and began shipping them to market, and, at some time prior to the hearing of the motion to dismiss, he filed in the court a report showing his actions as receiver (Printed Rec. 38 to 42). This report shows that Pierce had paid all the expenses of handling the cattle, and all the expenses of shipping and selling the same, and had left for himself the full amount which he was entitled to receive on said cattle under his said contract with the Campbell Commission Company, including interest, and that he reported himself as having a balance in hand, and subject to the orders of court, of $22,361,64. The receiver's report shows a statement of the amount owing by the Campbell Commission Company to the said receiver under the said contract, and shows the interest accruing on the same, and shows that the whole of that amount was paid by the receiver, Pierce, to himself (Printed Rec. 39 and 40, and first and second lines of 41). In fact, Pierce took the receivership of the cattle under an agreement, and so that he might control their sale and receive and

keep what was owing him under his contract with the Campbell Commission Company, and, having received that amount, was fully satisfied with the result, and claimed nothing more; but in trying this issue without evidence, there is no record of these facts, save the order apointing Pierce, receiver, his acceptance of that appointment and his report.

AUTHORITIES.

Wade on Attachments, Sec. 289, p. 553.
Langdon vs. Conklin, 10 Ohio St., 439.
Mitchell vs. Skinner, 17 Kan., 563.

ARGUMENT.

Plaintiff's action was brought under Sections 4120, 4121 and 4122 of the Oklahoma Statutes of 1893, relating to civil procedure. Section 4120 provides in effect that if a debtor has sold or disposed of his property with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or about to make such fraudulent disposition of his property or to remove the same with the intent of cheating or defrauding his creditors, or hindering or delaying them in the collection of their debts, any creditor may bring an action on his claim against such a debtor before the claim is due and may have an attachment against the property of the debtor. For a copy of this section see page 22 of this brief. Section 4121 provides how an attachment may issue on a claim which is not yet due, and by whom the attachment may be ordered. (Supra p. 22 and 23). Section 4122 provides that in any action on a claim not yet due, if an attachment be refused, the action shall be dismissed, and that in all such action an application for an attachment must be made.

As has already been stated, plaintiff's suit was brought under these provisions of the Oklahoma Statutes. Its claim was not due when suit was filed. It made application for attachment

under the provisions of section 4120 and the attachment was ordered under the provisions of section 4121 by the probate judge of Noble County, Oklahoma, in which county the suit was filed. While the question does not directly arise in the course of this brief, plaintiff's attorneys regard the action as an attachment proceeding purely and as having been brought and as being allowed by the law for the purpose of impounding and holding defendant's property until the maturity of the debt owing to the plaintiff.

Now it follows that this action, being strictly an attachment proceeding, it has no standing in court and must be dismissed if the probate judge had no authority to grant an order of attachment, for in such case, plaintiff's attachment having been granted by the probate judge, and the probate judge being without authority, the attachment is and was a nullity and should have been dismissed, and this having been done, and the plaintiff being there in court without an attachment, the provisions of Section 4122 at once come into operation and plaintiff's action must be dismissed, unless, indeed, he may have the right to make a new application for an order of attachment to the district judge and to proceed under a new attachment.

But no such result as the dismissal of the suit necessarily follows a finding of the court, in advance of the maturity of plaintiff's debt, that up to the time of such finding plaintiff has failed to seize any of defendant's property, for plaintiff is in court with a writ of attachment properly granted and is entitled, upon demand, to have alias writs to the sheriffs of different counties, and, upon affidavit, may have writs of garnishment to sundry garnishees and plaintiff having complied with the law, and having applied for an attachment, and the cause not having been refused, has the right to have his action stand until the maturity of his debt, and, in the meantime, to use as best he can the process which the law has given him for his protection. Consequently, a motion to dismiss, because the only property attached at the time of the hearing of the motion does not belong to the defendant, should have been

overruled, regardless of the truth or falsity of the ground alleged, which is not sufficient to support the motion, and, if true, can require no such relief as was sought by the defendant,

If it is true that property has been attached which does not belong to the defendant, the only remedies are, first, if the owner has intervened and claimed the property, to adjudge it to him on final trial with damages for its detention, if any have been suffered; or, second, if the owner does not chose to claim the property, then to relegate him to his action for damages, and to proceed to condemn the property as if it did belong to the defendant. In no case does the seizure of property not belonging to the defendant do the defendant any injury or entitle him to any relief. Therefore, the courts have decided, and the text writers have laid it down as a rule, that it is not competent for a defendant to move to vacate an attachment on the ground that he does not own the property attached under the writ.

But the defendant may say in reply: "I do not ask to have the attachment vacated. I ask to have the court hold that there is no basis for constructive service."

The materiality of the distinction has no existence outside of the imagination of defendant's attorneys. The trial court overruled this ground; the Supreme Court of the Territory, preferring to sustain it, disregards the distinction attempted to be made by defendant's attorneys and dismisses, not because of any defect in the service in the case, but because it says the trial court has within its jurisdiction no property which it can condemn for plaintiff's debt.

But returning to plaintiff's motion: Constructive service is a creature of statute law, and the basis of constructive service in Oklahoma Territory is an affidavit, the terms of which are prescribed by Section 3951 of the Statutes of 1893, relating to civil procedure. Section 3950 of said Statutes provides that service by publication may be made in certain cases, one of which is "in actions brought against a non-resident of the Territory or a foreign corporation having in the Terri-

tory property or debts owing them, sought to be taken away by any of the provisional remedies or to be appropriated in any way." Section 3951 requires an affidavit to be made, showing that service of summons cannot be made, and that the case comes within the provisions of Section 3950, and provides that "when such affidavit is filed, the party may proceed to make service by publication." It is plain that the affidavit is the basis, and the only basis of constructive service by publication in Oklahoma Territory and the statutes of the Territory make no provision for contesting this affidavit, or for setting aside the service should any of the statements made in the affidavit appear to be false.

The trial court adjudged the attachment proceedings null and void, and, in express terms, vacated such proceedings, and, this having been done, it proceeded, from this judgment as a basis and foundation, to the conclusion that the suit should be dismissed. Very plainly, the trial court regarded and treated the defendant's motion as one which could not be granted without first vacating the attachment, and as being to all intents and purposes a motion to that end. Yet the authorities are all one way in holding that a defendant cannot assign it as an objection to an attachment that property has been taken, under, the writ which does not belong to the defendant.

The Supreme Court of the Territory affirms the judgment dismissing this suit, because, it says, the attached property cannot, be held under the attachment, but must be released. This is nothing else than a judgment vacating the attachment, and it is not possible to sustain defendant's motion to dismiss upon the third ground urged in support thereof without first vacating plaintiff's attachment and releasing the attached property.

SECOND PROPOSITION.

That where the question of ownership of attached property becomes material in the progress of an attachment suit, the issue must be raised upon the pleadings, and the question must be tried in due course and in the same manner as are other issues of fact.

STATEMENT.

The question of the ownership of the property held under attachment by plaintiff was raised between plaintiff and A. H. Pierce, by the interplea filed by the said Pierce, and the answer made thereto by the plaintiff, the Certral Loan and Trust Company. The effect of the interplea of A. H. Pierce has already been fully stated. In this plea, he alleged that five thousand head of steer cattle had been wrongfully taken from him and were being wrongfully detained by the Central Loan and Trust Company, acting by and through the sheriff. He prayed for a judgment for the return of said cattle, and for damages for their seizure and detention (Printed Rec. 16 and 17). The Central Loan and Trust Company answered said interplea by a general denial and by a special allegation that the said Pierce had waived and abandoned all his interests and claim in and to the cattle, except what he held by virtue of his appointment as receiver in this suit and by virtue of his acceptance of said appointment (Printed Rec. 70).

On the 21st of September, 1895, T. A. Stoddard intervened in this cause, by filing his interplea in which he claimed that he was the owner of the attached cattle, and asked that the proceeds remaining in the hands of the receiver, after the sale of the cattle, and after the payment of expenses and of the amount retained by the receiver, Pierce, as hereinbefore stated, on his contract with the defendant, the Campbell Commission Company, be paid over to him, the said Stoddard (Printed Rec. 31 et seq.).

On the 25th of November, 1895, G. W. and J. C. Miller

intervened in this cause, and filed their interplea wherein they claimed to be the owners of the attached cattle, and prayed that the balance of the proceeds remaining in the receiver's hands be turned over to them (Printed Rec. 44 et seq).

These three interpleas present the issues as to the ownership of the attached cattle. It is true that the Pierce interplea, as shown by his report as receiver, has been abandoned, but Stoddard and Miller Bros., each asserted ownership of the attached property, and the plaintiff asserted that said property belonged to the defendant, the Campbell Commission Company. These issues, the plaintiff claims, should have been treated in due course, and in the same manner, and with the same right of jury and to introduce testimony, as in the case of any other issue between the parties to a suit.

The Campbell Commission Company moved to dismiss this cause, because, among other thing's there had been no seizure of any of the defendant's property within the jurisdiction of the trial court, either by attachment or garnishment process, and in support of this ground of its motion it referred to the answer in garnishment of the said A. H. Pierce (Printed Rec. 49). The trial court heard this motion upon the face of the record, and took no testimony, and permitted the introduction of none, and decided this particular ground adversely to the motion (Printed Rec. 50 and 51). The Supreme Court of the Territory also decided the case upon said motion to dismiss, and as no trial of the issue was had in the lower court, so necessarily no trial was had in the Supreme Court, and the motion was decided upon the face of the record, and the case was dismissed on an issue of fact, tried without evidence and without the intervention of a jury.

AUTHORITIES.

Under this proposition, plaintiff contends that an issue as to the ownership of attached property, arising in the course of an attachment proceeding, must be treated like other issues in a case, and must be tried upon the pleadings between the parties who are entitled to raise the issue, and an opportunity must be given for the introduction of evidence and for the intervention of a jury to pass upon the questions of fact. It requires no imagination to see what injustice may be done and what evils may grow out of such a summary hearing, as was permitted in this case, of the issue as to the ownership of the cattle which had been subjected to plaintiff's writ of attachment.

By the letter of the law the answer of the garnishee Pierce, not having been controverted within the statutory period, was to be taken as true. But suppose it to have been the case that after the filing of said answer the garnishee came to the plaintiff an exhibited his cattle contract with the Commission Company, and stated that he desired nothing more than the amount of money to which he was entitled under said contract, and it was then agreed between the plaintiff and the garnishee that the garnishee should be appointed receiver, if the trial court consented, and should sell the cattle and keep the money until he was himself fully paid, and, if the proceeds of the cattle were not sufficient, then that the plaintiff in attachment should pay to the garnishee any loss he might suffer, while, if such proceeds were more than sufficient, the balance remaining after the payment of the garnishee should be held subject to the order of the court, and that, pursuant to said agreement, the plaintiff refrained from controverting the answer of the garnishee, and asked to have the garnishee appointed receiver, and said appointment was made, and this verbal agreement was in all respects carried out. If, afterward, the garnishee insisted upon holding the entire fund, and insisted that he should have judgment on his answer, is it not probable that the plaintiff would have been permitted to

controvert the answer, even though the statutory period had long before expired? Any number of situations will at once present themselves to the mind, in which the effect of the statute, limiting the period for giving notice of the intention of the plaintiff to controvert the answer of the garnishee, would be disregarded by the court, and plaintiff would be permitted, after the expiration of the period, to take issue upon the answer. By the sort of proceeding which has been indulged in, in this case in the Supreme Court of the Territory, all inquiry into the merits has been avoided and the plaintiff, without having had its day in court, is compelled to suffer the loss of the debt sued upon, notwithstanding it had used all possible diligence toward obtaining security.

THIRD PROPOSITION.

The official return of the sheriff of Noble County endosred on the writ of attachment in this case showed that the property which had been seized under such writ of attachment was the property of the Campbell Commission Company, and as between the parties to the writ, that, is as between the plaintiff who sued out the writ, and the defendant against whow it ran, the official return imparted absolute verity and could not be attacked on a motion to dismiss.

STATEMENT.

The official return upon the writ of attachment reads as follows, to-wit:

"Received this order, July 3rd, 1895. July 3rd, 1895, at 3:30 o'clock P. M., I executed the same by going to the place where property of the within-named defendant, The Campbell Commission Company, described in the inventory and appraisment hereto annexed, was found, and there, at 3:30 o'clock P. M. of said day, in the presence and hearing of A. C. Bell and Fid Bishop, two credible persons, declared that, by virtue of said order, I attached said property at the suit of the within-named plaintiff, and, with A. C. Bell and Fid Bishop, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of all of said property attached, which inventory and appraisement was by me and said householders signed, and is hereto annexed and returned with this order. I delivered a copy of this order, duly certified, to each of said defendants, ————. I cannot find the within named defendant, The Campbell Commission Company, in my county. Said property is in my custody, held subject to the order of the within named court.

I delivered said property so attached to ———, in whose possession it was found, upon the execution by such person, in my presence, of the undertaking herewith.

JNO. A. HANSEN, Sheriff.

(Printed Rec. 11 and 12.)

The only attack made upon this return was made by a motion to dismiss the said cause on the ground that it appeared, from the answer of the garnishee, that none of the defendant's property had been attached. The cause alleged in said motion could not exist if the officer's return were true. In dismissing the suit upon this ground, the Supreme Court of the Territory necessarily held that the official return on the writ of attachment was false, and necessarily vacated the return without requiring a direct attack to be made upon the same, and affording plaintiff an opportunity to prove or attempt to prove that the property attached did belong to the defendant, and that garnishee had waived his claim thereto.

AUTHORITIES.

1 Rice on Evidence, p. 218.
Miller vs. United States, 11 Wall., 268.
Brown vs. Kennedy, 15 Wall., 591.
Ladd vs. Wiggin, 35 N. H., 421.
Stevens vs. Brown, 3 Vt., 420.
Stewart vs. Stringer, 41 Mo., 400.
Folsom vs. Carli, 5 Minn., 333.
Stinson vs. Snow, 10 Maine, 263.
Whitaker vs. Sumner, 7 Pick. (Mass.), 551.
O'Connor vs. Silver, 26 Tex., 606.

FOURTH PROPOSITION.

A answer in garnishment when uncontroverted becomes conclusive evidence of the right of the garnishee to be discharged, but such an uncontroverted answer is not and never becomes evidence in any other than the garnishment proceeding. The judgment in garnishment discharging the garnishee is, except in the case of a direct attack, conclusive evidence that the garnishee has been discharged and is evidence of that fact in other and different proceedings from that in which it was rendered, but the mere answer of the garnishee when uncontroverted, even if upon its face it appears to entitle the garnishee to an immediate discharge is not evidence and has no legal effect in any other than the garnishment proceeding itself.

STATEMENT.

The answer in garnishment, after showing all facts which are required by statute for the discharge of a garnishee, sets out the contract between the garnishee, Pierce, and the Campbell Commission Company, and alleged that this contract had been carried out by the garnishee, Pierce, but that the payments therein called for had not been made by the Campbell Commission Company, except to the extent stated in the contract, and to the further extent of the proceeds of two thousand head of cattle sold in Wharton County, Texas. It also alleged that the garnishee, Pierce, had possession of the attached cattle, up to and at the time of making said answer, and that the rights of the Campbell Commission Company had been transferred to one T. A. Stoddard, by a transfer dated July 1st, 1895, but concerning which the garnishee did not pretend to state the true date of its execution. The garnishee prayed that he be discharged from garnishment, and that he be allowed his expenses and attorneys fees (Printed Rec. 19).

The statement in the answer in garnishment, that the gar-

nishee was then in possession of the attached property, was manifestly untrue, and was shown to be untrue, in the original case at least, by the official return endorsed upon the writ of attachment, and by the interplea of the said garnishee, Pierce, for in said interplea, which is also verified by affidavits, said Pierce shows that the attached property had been taken and was being detained from his possession, and that the taking and detention were under plaintiff's attachment (Printed Rec. 16). It was not true that the garnishee, Pierce, was holding the attached cattle, but if plaintiff had controverted the answer and had alleged and proved that this portion was not true or that Pierce had waived his title to the cattle and had only a lien thereon, still this did not tend to hold the garnishee, for he had nothing in his possession. The cattle had been taken from him and were being held under attachment, and he could not be charged because of cattle which he did not hold. The garnishee wanted to get a certain sum of money out of the proceeds of the attached cattle, and plaintiff was willing to concede his rights in this respect, and there was no reason for any dispute between the plaintiff and the garnishee, Pierce. On plaintiff's application, Pierce was appointed receiver, and, as receiver, he took charge of the cattle and sold them and paid himself out of the proceeds, thereby satisfying the obligation to him of the Campbell Commission Company under said cattle contract. There was a balance of more than twenty-two thousand dollars of the proceeds of said cattle, and this balance Pierce held subject to theorder of the court, and so reported to the court, and his report was on file and formed part of the record in the trial court and in the Supreme Court of the Territory, and forms part of the record here.

AUTHORITIES.

Shinn on Attachment, Vol. 2, Sec. 638.
Rood on Garnishment, 374.
Rice on Evidence, 983.

In this connection, plaintiff in error and appellant cites the following Oklahoma statutes, showing that, in that jurisdiction, garnishments are separate proceedings, and have separate issues, and are tried separately from the main suit, and that the statute providing that an answer in garnishment, not controverted within the time limited by law, shall be conclusively presumed to be true, is a statute regulating the procedure in garnishment cases, and has no application to any other matter than the controversy, or possible controversy, between the plaintiff and the garnishee. The section numbers given below are those of the Oklahoma Statutes of 1893, relating to civil procedure.

"*Section 4078.* Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation) who shall be indebted to, or have any property, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner hereinafter described."

Section 4079 provides at what time and in what manner a plaintiff may procure a writ of garnishment, and what bond shall be given.

Section 4080 provides for the issuance of writs of garnishment and for their service and return; and Section 4081 provides for additional garnishments by plaintiff, and that if a garnishee reside in a county other than that in which the original action is pending, the court may, on motion, change to the county of garnishee's residence the place of trial of any issue joined in a garnishment proceeding.

"*Section 4082.* Within twenty days from the service of such garnishee summons, the garnishee may, if the truth warrant, file with the clerk of the court in which the action is pending his affidavit, substantially in the following form:" * * * * * * "Thereby the proceedings against such garnishee shall be deemed discontinued and the plaintiff shall pay the garnishee two dollars for his costs, unless within twenty days thereafter the plaintiff serve notice

on such garnishee that he elects to take issue on such answer as garnishee and will maintain him to be liable as garnishee, in which case, the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto."

"*Section 4083.* Unless the garnishee shall make the affidavit provided for in Section 204, he shall, within twenty days from the service of the garnishee summons, file an affidavit in which he shall state—" * * * * * * * *

"*Section 4085.* The answer of the garnishee shall, in all cases, be conclusive of the truth of the facts therein stated, unless the plaintiff shall, within twenty days, serve upon the garnishee a notice in writing that he elects to take issue on his answer, in which case, the issue shall stand for trial as in a civil action, in which the affidavit on part of the plaintiff shall be deemed the petition, and the garnishee's affidavit the answer thereto. The plaintiff may, in all cases, move the court, upon the answer of the garnishee, and of the defendant if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answer."

"*Section 4087.* The defendant may, in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any garnishee, upon the ground that the indebtedness of the garnishee or any property held by him, is exempt from execution against such defendant or for any other reason is not liable to garishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."

"*Section 4088.* The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions for

enforcing judgment shall be applicable thereto; but when the garnishment is not in aid of an execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if the defendant have judgment, the garnishee action shall be dismissed with costs. The court shall render such judgment, in all cases as shall be just to all the parties and properly protect their respective interests, and may adjudge the recovery of any indebtedness, the conveyance, transfer or deliverly to the sheriff, or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand, or by the judgment pass the title thereto; and may therein, or by its order, when proper, direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representatives for all money, goods effects or credits paid, delivered or accounted for by the garnishee by force of such judgment.

FIFTH PROPOSITION.

Even though it were true that upon the hearing of a motion to dismiss made by the defendant in an attachment suit upon the ground that the attached property does not belong to the defendant, an answer filed in an ancillary garnishment may be looked to as bearing upon the question of the ownership of the attached property, still such answer cannot, as between the plaintiff and the defendant, who are the parties to the motion, be conclusive of the question, nor can it have greater value as evidence than the sworn interplea filed in the attachment suit by the person who stands as garnishee and who has answed as such in the garnishment proceeding, or the official return endorsed on the writ of attachment by the officer who executed the same, nor has the answer in garnishment greater weight as evidence than the subsequent action of the garnishee as record of his official report as receiver of the attached property.

STATEMENT.

The substance of the answer in garnishment has been stated in this brief, and there is no need to repeat it here (See pages 9 to 12 of this brief). For a statement of the interplea filed in the main or original suit by A. H. Pierce, who was also garnishee in the garnishment proceeding, see page 12 of this brief. The official return of the sheriff of Noble County, Oklahoma, as endorsed on the writ of attachment, is set out in full on page 38 hereof. The substance of the order appointing A. H. Pierce, garnishee in the garnishment proceeding and interpleader in the main suit, as receiver of the attached property, is stated on page 13, and the acceptance of said appointment by said Pierce is set out on page 13 hereof, while the substance of the report of said Pierce as such receiver can be found by reference to page 13.

AUTHORITIES.

SIXTH PROPOSITION.

The question of the ownership of attached property is not open for consideration in an appellate tribunal when the ruling of the lower court thereon has not been assigned as error, or presented for consideration in any of the briefs filed in or arguments made before such appellate tribunal and when no trial was had in the lower court of the issue as the ownership of said property and no evidence was introduced and no opportunity was afforded for the introduction of such evidence.

STATEMENT.

The question as to the ownership of the attached property was raised by the motion to dismiss, filed in the trial court by the defendant, the Campbell Commission Company, in the following words, to-wit;

Third. Because there has been no seizure of any of defendant's property, within the jurisdiction of this court, either by attachment or garnishment process, and reference is hereby made to the fact that the defendant has and had no interest in the property attempted to be seized and garnisheed in this cause—which said—disclosing such facts, never joined issue nor served any notice of taking issue on such answer. Whereby the said answer became and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service" (Printed Rec. 49).

The Campbell Commission Company was defendant in error in the Territorial Supreme Court. Its assignments of errors read as follows, to-wit:

"Comes now the defendant in error, and hereby assigns its cross-errors, as follows, for the consideration of said court, in case the petition in error shall be sustained:

"The defendant in error insists that the ruling of the court below would still be right in this case, on the grounds stated in the motion, and which were denied by the court below, and,

in the event of the reversal of the court below on the grounds stated, alleges error in the court below.

"*First.* In holding the notice for publication sufficient.

"*Second.* In holding the attachment proceedings valid, notwithstanding the failure to execute the bond or undertaking in attachment, and, in the event that the court below shall not be sustained upon the ground of its ruling, asks that said cause still be affirmed upon the grounds herein specified" (Printed Rec. 5).

The briefs filed in the case in the Supreme Court of the Territory did not refer to the action of the trial court in overruling the third ground of defendant's plea to the jurisdiction, and no mention of the question was made in argument before that court.

The judgment of the trial court shows that the motion was heard and considered on the face of the record, as it stood when the hearing of the motion began, and that no evidence was introduced or considered, other than those matters of which the court took judicial notice because disclosed by the record in the cause (Printed Rec. 50 and 57).

AUTHORITIES.

Leavenworth vs. Atchison, 37 S. W., 914.

SEVENTH PROPOSITION.

The contract set out in the answer of the garnishee, Pierce, discloses the fact that the defendant, the Campbell Commission Company, had an attachable interest in the attached cattle, and the report filed by Pierce, as receiver, shows that all his demands against the cattle have been fully satisfied, and that the remaining proceeds, being over twenty-two thousand dollars, are subject to plaintiff's attachment. While the answer in garnishment does not pretend to state when the transfer by the Campbell Commission Company to T. A. Stoddard was made, or that it was made before said cattle were taken under plaintiff's attachment, and if the answer in garnisnment be taken as true, still, the court erred in holding that no property had been brought within the jurisdiction of the court and subjected to plaintiff's demand.

STATEMENT.

The contract set out in the answer in garnishment is copied in full on pages 9, 10 and 11 of this brief. Pages 39 and 40 of the printed record show the appropriation by the receiver, A. H. Pierce, who, out of the proceeds of the attached cattle, paid to himself the amount of his entire demand against the Campbell Commission Company under said contract. Pages 27 and 28 of the printed record show the appointment of said Pierce as receiver of the attached cattle, and, by that part of the order set out on page 28 of said record, said Pierce is expressly authorized to sell said cattle, and to retain the amount owing him under said contract. The answer in garnishment alleges that prior to July 6th, 1895, on which day said Pierce was served with a summons in garnishment, he was notified of a transfer by the Campbell Commission Company to one T. A. Stoddard of the said contract. This transfer was dated July 1st, 1895, but the answer in garnishment does not pretend to say when it was

executed, or that it was ever executed, or that it was an actual transfer in good faith (Printed Rec. 22).

AUTHORITIES.

McNamara vs. Culver, 22 Kan., 668.
Jones on Mortgages, Sec. 265.
Glover vs. Payne, 19 Wendell, 518.
Overstreet vs. Baxter, 30 Kan., 232.
Eckert vs. McBec, 27 Kan., 232.
Tusts vs. Beach (Col.), 44 Pac., 771.
Savings Bank vs. Theater Co. (Col.), 36 Pac., 902.
Hart vs. Mfg. Co., 7 Fed. Rep., 553.
Hervey vs. Locomotive Works, 93 U. S., 664.
McCormick vs. Hadden, 37 Ill., 370.
Ketchum vs. Watson, 24 Ill., 591.
Herryford vs. Davis, 102 U. S., 235.
Oklahoma Statutes of 1893, Sec. 3181.
Chicago vs. Merchants, Etc., Bank, 136 U. S., 286.
Arkansas vs. Mann, 130 U. S., 69.
4 Kent's Com., p. 144.
Hutzler vs. Philips (S. C.), 4 Am. St. Rep., 699.

EIGHTH PROPOSITION.

It does not appear by any statement made in the answer in garnishment of A. H. Pierce, that the transfer to Stoddard was ever in fact executed, or that any actual transfer existed, the answer in garnishment merely averring that the garnishee has notice of a purported transfer which garnishee sets out, and afterward pleads its legal effect if it should be found to exist.

STATEMENT.

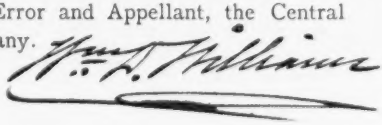
The Supreme Court of the Territory in this opinion, says: "The answer of the garnishee showed * * * that the defendant, at the time of the service of the garnishment, had no interest whatever in said" (attached) "property, having transferred and assigned whatever interest he" (it) "might have had, by virtue of said contract, to one Stoddard, in trust, to be applied in the payment of certain of his" (its) "debts, amounting to more than any interest which he" (it) "might have had in said property." The Supreme Court persisted in this erroneous statement of facts, notwithstanding the motion for rehearing made by the Central Loan and Trust Company. The answer of the garnishee states that, "prior to July 6th, A. D. 1895, this garnishee received notice that an assignment had been made of said contract, by said Campbell Commission Company, to T. A. Stoddard, as trustee, which assignment is in words and figures as follows:" Here follows copy of the assignment (Printed Rec. 22). After stating the proposed assignment, the answer continues as follows: "The said garnishee, A. H. Pierce, is informed and so charged that, by reason and in virtue of said assignment, all the right, title and interest of said Campbell Commission Company, of, in and to said contract, whatever the same may have been at the time of said assignment vested, became transferred to and is now owned and held by said Stoddard as such trustee." The latter extract from the

answer of the garnishee pleads conclusions of law, and nothing else, and, under the well settled rule in such cases, it is not required to be traversed, and the answer stands without any allegation of the actual existence of a transfer from the Campbell Commission Company to T. A. Stoddard, and without any allegation as to the date of the execution of such transfer. Hence we say that the Supreme Court erred in the statement which it made as quoted above. In addition to this, that portion of the statement of the Supreme Court of the Territory above quoted, which says, in effect, that the answer of the garnishee shows that the Campbell Commission Company had transferred its interest in said contract to Stoddard, to be used in paying debts amounting to more than the interest of said defendant Commission Company in said contract, is equally far from the facts. The garnishee does not pretend to say what was the value of the Campbell Commission Company's interest in said property. In the view taken of this case by the attorneys of the Central Land and Trust Company, these matters are not very natural, but it would certainly be more satisfactory if the Territorial Supreme Court, having before it a printed record, and believing such questions to be material, would take the trouble to ascertain the facts as they appear of record, before deciding a case.

It is respectfully submitted that the judgment in this cause should be reversed and the cause remanded for trial.

WILLIAM D. WILLIAMS,

Attorney for Plaintiff in Error and Appellant, the Central Loan and Trust Company.



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No. 430. 145.

FILED.
OCT 18 1897
JAMES H. McKENNEY,
CLERK.

Brief of Opp Starbell for D E. (mo

(16643.)

Filed Oct 18, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

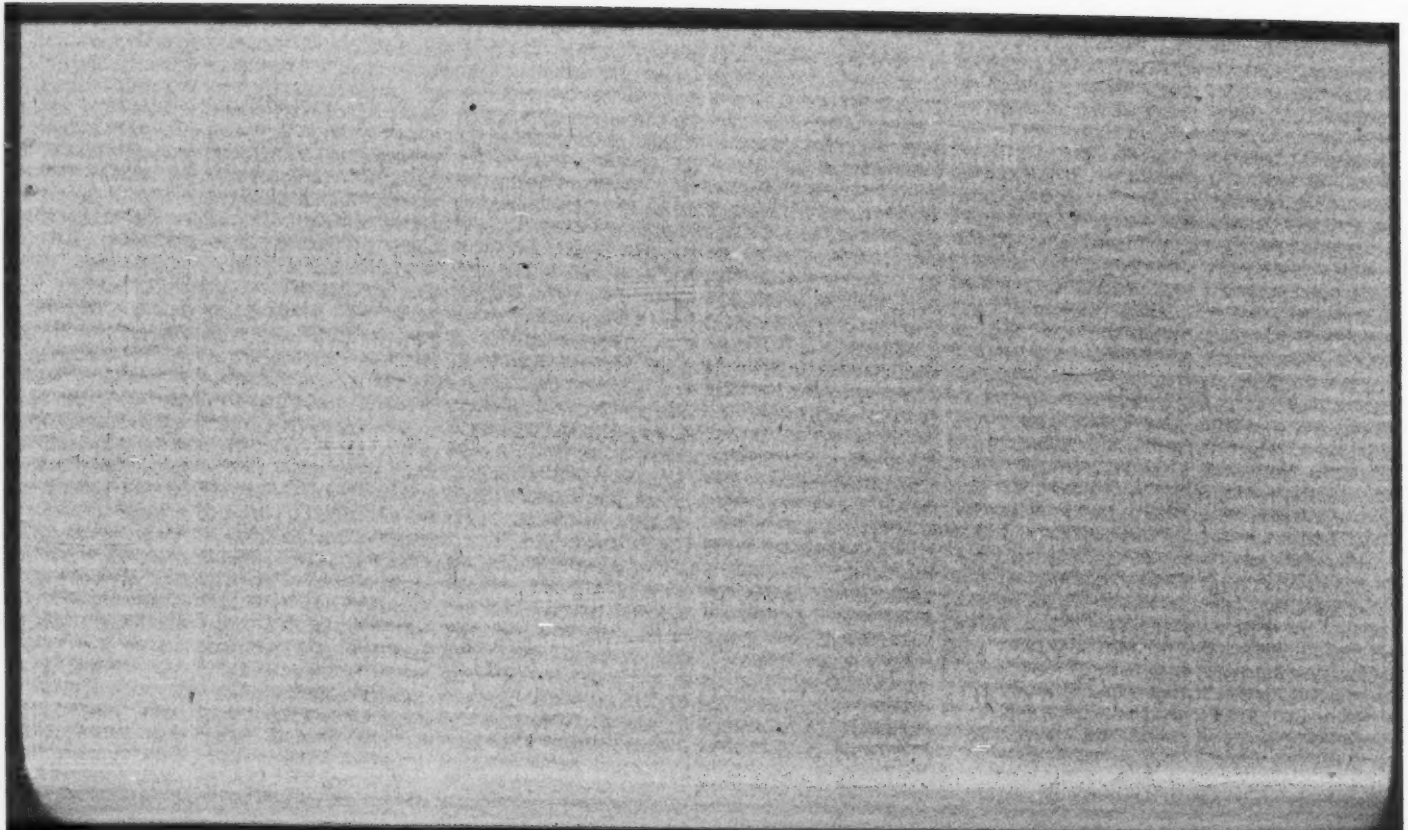
No. 430.

THE CENTRAL LOAN & TRUST COMPANY,
Plaintiff in Error and Appellants,
AGAINST
THE CAMPBELL COMMISSION COMPANY,
Defendant in Error and Appellee.

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

MOTION TO DISMISS.

STATE CAPITAL PRINTING CO., GUTHRIE, OK.



(16643.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 430.

THE CENTRAL LOAN & TRUST COMPANY,
Plaintiff in Error and Appellants,

AGAINST

THE CAMPBELL COMMISSION COMPANY,
Defendant in Error and Appellee.

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

MOTION TO DISMISS.

Now comes the defendant in error and appellant, and moves the Court to dismiss this appeal and writ of error, for the following reasons:

This action was an action in the District Court of Noble County, Oklahoma Territory, to recover judgment against this defendant in error in the sum of sixteen thousand dollars ($16,000.00) with interest, on a promissory note before the same was due and an attachment

was attempted to be procured in pursuance to the provisions of the Code of Civil Procedure of Oklahoma Territory, authorizing suit in attachment proceedings on debts before due. A certain writ of attachment was issued in the cause (see page 11, printed record,) and subsequently an order of garnishment was issued to one A. H. Pierce (see record, p. 13). Subsequently A. H. Pierce filed his interplea in the case claiming the attached property (see record, p. 16). Subsequently the said A. H. Pierce filed his motion in the case to discharge the attachment (see record pp. 17 and 18). Subsequently the said A. H. Pierce answered in the case as garnishee (see record, p. 19). This answer of Pierce, as garnishee, disclosed the fact that T. A. Stoddard also claimed the garnished and attached property, and at the instance of the plaintiff in the case an order was made therein requiring the said Stoddard to interplead in said cause and to set up his interest in the garnished property (see record, p. 30). Subsequently the said T. A. Stoddard filed his interplea in the case, claiming to own the attached and garnished property (see record, p. 31). Subsequently the plaintiff filed a demurrer to the interplea of T. A. Stoddard (see record, p. 43), and thereafter one George W. Miller and J. C. Miller also filed an interplea in the case, claiming the attached property (see record, p. 44). Thereafter the plaintiff filed an answer to the interplea of A. H. Pierce (see record, p. 46,) and thereafter and on the 16th day of December, 1895, the defendant in error and appellee filed a plea to the jurisdiction of the Court in the cause (see record, p. 49,) and thereafter and on the 16th day of July, 1895,

the Court sustained the said plea to the jurisdiction in said cause and dismissed the case. That part of the order (see record, p. 51) reads as follows:

"It is further considered, ordered and adjudged that by reason of the nullity of the said attachment proceedings the attempted service by publication in this matter upon the defendant, The Campbell Commission Company, is null and void and of no effect, and that the Court has no jurisdiction to hear and determine this cause, to which the plaintiff duly excepted and excepts.

"It is therefore by the Court considered, ordered and adjudged that this action be and the same is hereby dismissed for want of jurisdiction," etc.

From this order of dismissal of the case for want of jurisdiction the plaintiff in error and appellant, as plaintiff in error, filed its petition in error in the Supreme Court of the Territory of Oklahoma, making the said Campbell Commission Company the sole defendant in error, and did not make the said A. H. Pierce, T. A. Stoddard, George W. Miller or J. C. Miller, or either of them, defendants in error in the Supreme Court of the Territory, and upon the affirmance of the said judgment of the District Court of Noble County in the Supreme Court of said Territory, the plaintiff in error, the Central Loan and Trust Company, appealed from the said decision of the Supreme Court of the Territory and also sued out a writ of error thereto, but in neither the appeal nor writ of error to this court are either or any of the said parties, to-wit: A. H. Pierce, T. A. Stoddard, J. C. Miller and George W. Miller made parties, and the sole defendant in error and appellee is the said defendant, the Campbell Commission Company. The appellee therefore, moves to dismiss this case for want of neces-

sary parties in this court to entitle the appellant and plaintiff in error to a review of the decision complained of.

ARGUMENT.

The proceeding in the trial court was essentially a proceeding *in rem*. The plaintiff had enforced the presence of all parties interested in the *res* on the record and the omitted parties were asserting ownership adverse to the plaintiff's attachment. The question of priority between Stoddard's transfer, of July first, and the plaintiff's seizure under its writ of attachment, of July second, is a narrow one in point of time alone.

The restoration of the status of this case, as a pending case in the court, and the restoration of the status of the plaintiff on a footing to contest the ownership of the property in the omitted parties in the court below, would be a judgment which would be vitally adverse to the interest of all these omitted parties. As the case stands, until The Campbell Commission Company should make a personal appearance in the case, it involved nothing except the ownership of the particular property and the right of the plaintiff as against the adverse claimants to subject it to the payment of its debt.

Black on Judgments, Sec. 836.

Freeman on Judgments, Sec. 567.

Penoyer vs. Neff, 95 U. S. 714.

Hart vs. Sansom, 110 U. S. 151.

Phillips vs. Thompson, 3 Stuart & Porter, 369.

Miller's interplea was authorized by paragraph 3918, Statutes of Oklahoma, 1893. Pierce's interplea was

authorized by the same statute, and by virtue of the garnishment process he also became a defendant in the case. (Par. 4088 and par. 4090, id.)

We insist, therefore, that the case comes fairly within the rule that where parties to the judgment in the Court below, whose interests will be substantially affected by a reversal, have been omitted in the Appellate Court, it has no jurisdiction to determine the case.

Ferguson vs. Smith, 10 Kan. 394.

Am. & Eng. Ency. of Law, Vol. 2, p. 192, and authorities cited.

Respectfully submitted.

Henry E. Asp.
John M. Shartel

Attorneys for Defendant in Error and Appellee.

The plaintiff in error and appellant will take notice that the above and foregoing motion to dismiss will be submitted to the Supreme Court of the United States on Monday, the 18th day of October, 1897, upon the opening of Court, or as soon thereafter as counsel can be heard.

Henry E. Asp.
John M. Shartel

Attorneys for Defendant in Error and Appellee.

Due service of the foregoing motion and brief is hereby acknowledged this _____ day of September, A. D., 1897.

Attorneys for Plaintiff in Error and Appellant.

Points Involved.

I.

Where an attachment is levied upon personal property in a proceeding *in rem*, and others than the debtor are brought on the record as parties defendant under statutory authority and compelled to assert their adverse interests and do assert paramount title to the attached property, and pending the determination of the question of ownership the defendant debtor secures an order dismissing the entire proceeding for want of jurisdiction, are the adverse claimants to the property necessary parties to proceedings in the appellate court which supersede such order of dismissal and seek to have it reversed?

II.

If the trial court in fact had no jurisdiction, but placed its ruling to that effect upon a wrong reason, can the appellate court uphold such ruling upon correct reasons without a cross-assignment of errors?

III.

If the debtor's interest in the attached personalty never was more than that of a conditional vendee, and the record conclusively shows the property to have been in the possession of the vendor, the condition not performed, and that the vendee had transferred all his interest therein to another previous to the levy, will the seizure authorize service of summons by publication upon the defendant, who is a non-resident?

IV.

Is it competent for the legislature of the Territory of Oklahoma to authorize service of summons upon non-residents of the Territory by publication under the restrictions of section ten of the organic act of the Territory?

V.

Can the legislature of the Territory enact a valid law authorizing the probate judge to make an order in the district court in the absence of the judge of such court granting an attachment in an action brought therein upon a demand before the same is due?

VI.

Is a statute which authorizes attachments upon debts before due upon an affidavit that the debtor is fraudulently disposing of his property, and an order of the court or judge awarding the same which requires the giving of a bond to secure the defendant in his damages if it be wrongfully sued out, if such defendant be a resident of the Terrritory, as a condition to the validity of the writ, and which exempts the plaintiff from giving such bond if the defendant be a non-resident of the Territory, violative of the civil-rights amendment to the Constitution and the acts of Congress passed for the purpose of enforcing its provisions?

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 145.

THE CENTRAL LOAN AND TRUST COMPANY,
PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CAMPBELL COMMISSION COMPANY, DEFENDANT IN ERROR AND APPELLEE.

BRIEF OF DEFENDANT.

ADDITIONAL STATEMENT OF FACT.

In addition to the facts stated in brief of appellant, we have to suggest the following, which may have some bearing upon the case:

The action was originally instituted in the district court of Noble county, Oklahoma Territory, on the 2d day of July, 1895. On the 3d day of July, 1895, the sheriff shows by his return that the property was levied upon by him on said date and appraised at the sum of twenty-five dollars per head, as near as could be ascertained, five thousand head of

steers in a certain pasture in the Ponca Indian reservation, same being the only cattle in such pasture, except sixty head belonging to James Harris, and giving the brand of the cattle and no other or further description.

The sheriff shows in his return (see Record, page 12) that he holds the said property in his custody subject to the order of the court, and that he delivered the property to —— ——, in whose possession it was found upon execution by such person, in my presence, of the undertaking herewith.

No undertaking appears in the record, nor does it show when the sheriff filed his return. Afterwards, on the 6th day of July, 1898, and after the attempted levy had been made on this property, the defendant filed an affidavit for garnishment against A. H. Pierce (see Record, page 13), and on the 8th day of July, 1895, a garnishment summons was filed in said cause, showing that it had been served on Pierce on the 6th day of July, 1895.

Subsequently Pierce filed his answer as garnishee by which he stated that prior to July 6, 1895, the garnishee received notice that an assignment had been made of the contract of purchase between himself and the Campbell Commission Company to one T. A. Stoddard, as trustee, and setting out the words of the assignment, which is dated July 1, 1895; and the answer continues, after quoting this instrument of assignment, as follows:

"Said garnishee, A. H. Pierce, is informed and so charged that by reason and in virtue of the said assignment of the right, title and interest of the said Campbell Commission Company of, in and to said contract, whatever the same may have been at the time of said assignment, vested, became transferred to and is now owned and held by said Stoddard as such trustee."

The contract between Pierce and the Campbell Commission Company is set out in full in the answer of the garnishee on pages 19 to 21, inclusive, and is also again exhibited in

the statement under oath made by the plaintiff in its application for the appointment of a receiver, pages 25 to 26, inclusive, in which application the status of Pierce as vendor in a conditional sale is admitted.

The contract referred to is a contract between Pierce and the Campbell Commission Company, dated the 8th day of September, 1894, and is an agreement to sell five thousand head of steers at an agreed price of $15 per head, and that the vendee, the Campbell Commission Company, should care for same in its own pastures in the Indian Territory and ship same to market for the account of the vendor until he should receive and the same should be paid for at the rate of $15 per head. It was also stipulated that the ownership of the steers was to remain in the vendor until the full payment of the purchase price.

Pierce, the vendor, was in possession of the property at the time of its attempted seizure under his contract for the protection of his rights in the property. At the date of the attachment and garnishment proceedings there never had been paid on the purchase price of the cattle any sum except five thousand dollars paid at the time of the original purchase, and there was due on the contract seventy thousand three hundred and thirty dollars ($70,330), with accrued interest, from the Campbell Commission Company to Pierce.

The property attempted to be attached and that attempted to be garnished is one and the same property. There is no dispute as to Pierce's interest in the property being that of a vendor in a conditional sale in possession of the property, and that the purchase price remained unpaid.

ARGUMENT.

I.

Neither this court nor the court below has jurisdiction in this proceeding on account of the omission to make Stoddard, Pierce, and Miller and Son parties to the proceedings.

In this connection we refer the court specifically to the motion on file to dismiss upon this ground continued to final hearing; also to—

Hughes *vs.* Miller (Kans.), 42 Pac., 696.
Norton *vs.* Wood (Kans.), 40 Pac., 911.
Paving Co. *vs.* Botsford, 50 Kans., 331.
Steel *vs.* Baum, 51 Kans., 165.
Loan Co. *vs.* Lumber Co., 53 Kans., 637.
Guess *vs.* Briggs, 54 Kans., 32.
Wood *vs.* Staudenmeyer, 42 Pac., 321.
Ferguson *vs.* Smith, 10 Kans., 394.
Ex parte Polster, 10 Kans., 204.
Armstrong *vs.* Durland, 11 Kans., 15.
Paper Co. *vs.* Hentig, 31 Kans., 322.
Richardson *vs.* McKine, 20 Kans., 346.
Brown's Appeal, 30 Kans., 331.

We cite this array of Kansas authorities because the Code of Civil Procedure of the Territory of Oklahoma, including appellate practice in the supreme court of the Territory, is literally copied from the Code of Civil Procedure of the State of Kansas, and because the decisions from that State construing that code were adopted with the act and should be resorted to as controlling authorities in the test of the question as to who are necessary parties in the court below.

The action is purely *in rem* (Cooper *vs.* Reynolds, 10

Wall., 308). The omitted parties were forced upon the record as parties in the trial court by the plaintiff, and they each asserted a superior ownership in the *res* to the lien of the plaintiff's attachment, and asserted it to be void because levied upon their property. The principal defendant obtained a ruling that the attachment proceedings are void even as to it, that judgment is superseded by the plaintiff, and appealed to the supreme court of the Territory, to which appellate proceedings the principal defendant is alone a party defendant. The supreme court of the Territory affirmed that ruling, and the case is brought here and the judgment is again superseded. The claimants to the *res* are still left kicking their heels in the trial court, unable to get out and unable to proceed in the cause, while the plaintiff and the principal defendant consume several years litigating the question whether the plaintiff has a status in court which will permit him to question the title of the parties whom they have left behind in the trial court to the *res* involved.

We therefore submit that the case is not properly here for want of parties who would be prejudiced by its reversal.

II.

There is no merit in the contention of counsel that if the defendant in error wished to rely upon other grounds than that upon which the motion was ruled in the trial court it should have assigned cross-error in the supreme court of the Territory and in this court.

No principle seems to be better established than that reviewing courts will not reverse or set aside a correct result based upon a wrong reason. It is equally true that a ruling

of a lower court may be justified upon other grounds than those assigned by the court in making such ruling.

McClung *vs.* Silliman, 6 Wheat., 598.
Penna. R. Co. *vs.* Wabash R. Co., 157 U. S., 225.
Shepherd *vs.* Nabors, 6 Ala., 631.
Borden *vs.* Crook, 131 Ill., 68.
Jeure *vs.* Perkins, 29 Ia., 262.
Ormsby *vs.* Hunton, 3 Bibb., 299.
Kallman *vs.* U. S. Express Co., 3 Kan., 198.
Dudley *vs.* Goddard, 12 S. W. R., 302, 382.
See also Cushing Digest, vol. 3, p. 1196, where the authorities are elaborately collected.

III.

The defendant in error is shown by record of the plaintiff's own making to have no attachable interest in the property attempted to be levied upon, and there was, therefore, no basis to make service by publication.

We feel helpless to add anything to the able presentation of this view found in the opinion of Tarnsey, J., who rendered the opinion of the court below and which is set out on page 63 of the record. The authorities cited in the opinion fully support the doctrine that a vendee in a conditional sale of personal property where the condition has not been complied with has no attachable interest in such property.

Drake on Attachments, sec. 246.
Buckmaster *vs.* Smith, 22 Vt., 203.
McFarland *vs.* Farmer, 42 N. H., 386.
19 Federal R., 760.
Lucas *vs.* Birdsley, 41 Conn., 357.
Bradshaw *vs.* Warner, 54 Ind., 58.
Freeman on Judgts., sec. 124.

Strong *vs.* Taylor, 15 Hill (N. Y.), 325.
Sage *vs.* Slentz, 23 O. St., 1.
Cardinal *vs.* Edwards, 5 Nev., 40.
Harkness *vs.* Russell, 118 U. S., 671.
Carley *vs.* Bertran, 34 N. W. R., 674.
Bailey *vs.* Union Pac. R'y, 17 N. W. R., 567.

IV.

The process of foreign attachment and suits against non-residents by constructive service is prohibited by section 10 of the organic act of the Territory, which requires all civil actions to be brought in the county where the defendant may reside or be found.

The provisions of section 10 of the organic act of the Territory are not unlike the provisions found in the acts defining the jurisdiction of the several circuit courts of the United States, and the construction given to such provisions with respect to foreign attachment process are applicable to the question at bar.

Hollingsworth *vs.* Adams, 2 Dall., 396.
Toland *vs.* Sprague, 12 Pet., 300.
Ex parte R'y Co., 103 U. S., 794.

The above cited provision is a novelty in territorial legislation on the part of Congress and seems to clearly preclude and to be clearly intended to preclude the process of foreign attachment and publication service upon non-residents.

V.

The legislature of the Territory, under its organic act, has no power to devolve the functions of the district court nor its judge on any other persons or tribunal than the regularly appointed judge; otherwise it would still be incompetent to devolve these functions upon the judge of the probate court.

The act granting a writ of attachment under the circumstances is a judicial and not a ministerial act.

Harrison *vs.* King, 9 Ohio St., 393.
Seidentobf *vs.* Annabil, 6 Neb., 524.
Rayburn *vs.* Bracket, 2 Kans., 227.
Simon *vs.* Steter, 25 Kans., 157.
Morrison *vs.* Lovejoy, 6 Minn., 183.
Guerin *vs.* Hunt, 8 Minn., 477.
Howell *vs.* Muskegon, 88 Mich., 369.
Shinn on Attachments, page 351.

The case in the court below was also a proceeding at *common law* within the grant of exclusive jurisdiction to the district courts.

Brisenden *vs.* Chamberlain, 53 Fed. Rep., 307.
Parsons *vs.* Bedford, 3 Pet., 433.
Gaines *vs.* Fuentes, 92 U. S., 23.
Gordon *vs.* Longest, 16 Pet., 103.
Railway Co. *vs.* Cox, 145 U. S., 495.
Dennick *vs.* Railroad Co., 103 U. S., 11.
Railroad Co. *vs.* Whitton, 13 Wall., 270, 287.
Ellis *vs.* Davis, 109 U. S., 485, 497.
Lackawanna Coal and Iron Co. *vs.* Bates, 56 Fed., 737.
Insurance Co. *vs.* Comstock, 16 Wallace, 258.
U. S. *vs.* La Vengeance, 3 Dall., 297.
Webster *vs.* Read, 11 How., 437.
Kohk *et al. vs.* United States, 91 U. S., 375, 376.

Among the various cases which are held to come within this term "common law and chancery jurisdiction" are the following:

A statutory remedy to remove a cloud upon a title.

Bayerque *vs.* Cohen, 1 McAll., 113.

Clark *vs.* Smith, 13 Peters, 195.

Ex parte Biddle, 2 Mason, 422; 3 Fed. Cas., 337.

A statutory action of partition.

Aspen Mining Co. *vs.* Rucker, 28 Fed., 220.

A statutory right to enjoin a tax unknown to equity procedure as administered by the United States courts.

Paine *vs.* Wright, 6 McLean, 325; 18 Fed. Cas., 1011.

In the case of Muster *vs.* Spaulding, 16 McLean, 24; 17 Fed. Cas., 243, the circuit court of the United States took jurisdiction of a statutory action against a sheriff for suffering an escape of a person arrested under a fraudulent debtor's act. Under the same statute granting jurisdiction to the circuit courts of the United States, in the case of Grant *vs.* Hamilton, the circuit court of the United States took jurisdiction of a case to recover back money wagered at a play under a statute in derogation of the common law.

Supplemental proceedings under a statute, where distinct from original judgment, may be removed into the Federal courts.

Action for wrongful death under a statute.

Davis *vs.* Laffert, 12 Fed., 353.

Holme *vs.* O. & C. R'y Co., 5 Fed. Rep., 75.

Of an action to cancel an assignment, created by statute.

Jeffry *vs.* Brown, 29 Fed., 476.

Birnheim *vs.* Birnbaum, 30 Fed., 885.

A proceeding by a railroad company for condemnation of land (124 U. S., 197).

See also Peeler, Law and Equity of United States Courts, page 35.

The courts have construed the grant of jurisdiction to territorial district courts under the terms "common law" and "chancery jurisdiction" to mean the determination of all legal actions, whether they arise under the common law or by statutory legal remedies. Thus in *Yearin vs. Spears* (Utah), 10 Pac., 610, it is said:

"The organic act of the Territory (9 Statutes at Large, 453, sec. 9) provides that the said supreme and district courts respectively shall possess chancery as well as common-law jurisdiction, and the Supreme Court of the United States says that this language includes almost every matter, whether of civil or criminal cognizance which can be litigated in a court of justice."

In the case of *Browning vs. Browning* (N. M.), 9 Pac., 677, it was held that this grant of jurisdiction at common law and in chancery conferred jurisdiction upon the district court to administer the Spanish law, which the common law had not superseded in that Territory. And in passing on the case the court say:

"The just interpretation of the section under review is that it created courts of general jurisdiction in which all rights of persons and things, whether arising under the civil law as it obtained in Mexico prior to the treaty of cession or under the common law, the acts of Congress or the statutes of the Territory, should be protected and enforced," citing *Ferris vs. Higley, Territory vs. Flowers*, 2 Mont., 531.

These decisions are all based upon the naked words "at common law and in equity," and in no instance is there any context which enlarges the meaning of these terms. The following is the clause in the Oklahoma organic act

with that portion italicized not contained in the organic acts of other Territories or in judiciary acts of the Federal courts: "And said circuit and district courts respectively shall possess chancery as well as common-law jurisdiction *and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property.*" We think this equivalent to saying, in express terms, that the district courts shall have jurisdiction at common law, in chancery, and of all statutory rights and remedies. Be that as it may, however, this language as construed in all the acts of Congress by all of the courts of the United States, both with reference to territorial courts and United States courts, points to the fact that this language grants jurisdiction in statutory matters of litigation equally with pure matters of common law, so that the fact that an attachment may or may not be a statutory remedy, it is still embraced within the terms "common law" and "chancery jurisdiction" as used in the organic act.

The supreme court of the Territory overruled the reasoning of the trial court upon the assumption that the attachment process in question is not comprehended in the grant of jurisdiction to the district courts contained in the organic act of the Territory. The following language, found on page 59 of the Record, explains the whole reasoning of the court below:

"The power to issue attachments is not derived from the common law and never was a part of the jurisdiction exercised by the courts of chancery. It is purely of statutory authority and origin."

A statement the correctness of which we do not question. We do deny, however, that the territorial legislature has authority to place the enforcement of such a remedy in any other court or tribunal, when it once creates it, than the district court. The remedy of attachment once given comes within the grant of jurisdiction to such courts just as decidedly as the action of assumpsit always known to the common law.

VI.

The organic act of the Territory is its constitution. By that act and other acts of Congress amendatory thereof district courts are created and their jurisdiction defined to comprehend the process in question. The mode of filling the office is also defined by the same laws, both with respect to permanent and temporary incumbency, regular appointment, and temporary substitution in case of absence, sickness, or disqualification. These laws exclude the idea of power in the Territorial Assembly to fill the office of judge of that court for a single instant in any other way for the performance of any judicial act. The degree of substitution being immaterial, so long as it is for the performance of a judicial duty, it is indifferent whether it be for a single order or a term of court.

The Territorial Assembly in 1891 enacted certain legislation seeking to extend the powers and jurisdiction of probate courts and probate judges in the Territory of Oklahoma, and in view of the decision of this court in *Ferris vs. Higley*, 20 Wallace, 375, recognized its inability to make such legislation effective without the consent of Congress. It was therefore provided that such act should not go into effect until approved and ratified by Congress. This act is set out in full in Appendix No. 1 of this brief.

Subsequently Congress passed an act ratifying the extension of jurisdiction of probate courts and probate judges attempted by the Territorial Assembly.

Chapter 543, section 17, Statutes at Large, volume 26, among other things, provides:

"*Provided*, That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in town-site matters and

under such regulations as are provided by the laws of the State of Kansas."

At the time of the passage of this provision by Congress, the legislature had not attempted to enact any law authorizing probate judges to make orders in the district courts, and the enactment under which the probate judge presumed to act in granting a writ of attachment in the present case forms a part of the present Code of Civil Procedure of the Territory, which took effect upon the 14th day of August, 1893, long after the act of Congress above referred to.

This act of Congress ratified previous extensions of probate judges' power only, and gave no warrant for further future legislation on the part of the Territory further extending the jurisdiction and authority of the probate judges and the probate courts. This law and the act of Congress ratifying the same constitute a very clear legislative construction of the organic act, manifesting the necessity for the consent of Congress to the granting of jurisdiction at law and chancery to probate courts.

There is, therefore, no express authority of Congress for this measure. Can it be exercised under the organic act and the legislation of Congress supplemental thereto?

Section 9 vests the judicial power of the Territory in a supreme court, district courts, probate courts, and justices of the peace, and provides that the associate justices of the supreme court shall be judges of the district court. Section 14 provides that the chief justice and associate justices shall be appointed by the President and confirmed by the Senate.

Section 3 of an act of Congress approved December 21, 1893 (28 U. S. Stats. at Large, p. 20), reads as follows:

"SECTION 3. That the said Territory shall be divided into five judicial districts, and a district court shall be held in each county, as now provided by law. The supreme court of said Territory shall define said judicial districts, and shall fix the time and place at each county-seat in each district where the district court shall be held, and designate the

judge who shall preside therein. Each judge, after assignment, shall reside in the district to which he is assigned. THE SUPREME COURT OF SAID TERRITORY, OR THE CHIEF JUSTICE THEREOF, MAY DESIGNATE ANY JUDGE TO TRY A PARTICULAR CASE OR CASES IN ANY DISTRICT WHEN THE JUDGE OF SAID DISTRICT HAS BEEN OF COUNSEL OR IS OF KIN TO EITHER PARTY TO THE ACTION, OR INTERESTED, OR IS BIASED OR PREJUDICED IN THE CAUSE, OR IF FOR ANY OTHER REASON SAID JUDGE IS UNABLE TO HOLD COURT."

It would seem that a bare reading of these provisions would make it palpable that any attempt on the part of the Territorial Assembly to place any other person in the shoes of the regularly appointed district judge for any purpose pertaining to that office is invalid.

This view, under similar constitutional provisions, is fully upheld by the authorities on principle:

Hoagland *vs.* Creed, 81 Ill., 506.
Cobb *vs.* The People, 84 Ill., 52.
Elliott Gen. Prac., v. 1, sec. 24.
Winchester *vs.* Ayers, 4 Greene (Ia.), 105.
In re Gill, 20 Wis., 686.
Chandler *vs.* Nash, 5 Mich., 409.
Harper *vs.* Jacobs, 51 Mo., 296.
Wright *vs.* Boone, 2 Ia., 459.
Bishop *vs.* Nelson, 83 Ill., 601.
Cooley Const. Lim., 6th ed., p. 504.
State *vs.* Noble, 21 N. E. R., 246.

We further submit that a construction of the act enlarging the jurisdiction and powers of the probate judges and the probate courts, wherein there is a specific enumeration of the powers added and which includes the power in single instances to make an order in the absence of the district judge, to wit, the granting of injunctions, which is subsequently merged into an act of Congress by adoption and ratification, as is the case here, by its specific enumeration

of similar powers, excludes the right on the part of the legislature, without the further concurrence of Congress, of additional enlargement of the power of the probate courts and probate judges.

The case of Young *vs.* Lederick, 14 Kans., 78, in which the court below sought to justify its ruling that the probate judge could act as judge of the district court in granting a writ of attachment, is certainly misapplied.

It is true the Kansas supreme court, in *Young vs. Lederick*, held that it was competent for the legislature of that State to pass the identical statute in question here. It will be seen, however, from the language of Mr. Justice Brewer in deciding the case that he based his decision upon the absence of the very constitutional provision there that is present here. His decision rests upon the following language used in the opinion:

"The jurisdiction of the district court is not defined by the Constitution; it is left to the legislature to prescribe its limits and the manner of its exercise."

It is manifest from this premise that had jurisdiction been defined in the Constitution and the mode of supplying the absence of the district judge likewise prescribed, the result reached in *Young vs. Lederick* would have been different.

The question as to whether an extension of the probate judges' jurisdiction, as set out by Appendix No. 1, approved by act of Congress, makes that act an act of Congress, is learnedly discussed in Irwin *vs.* Irwin, 37 Pac. R., 548, and 41 Pac. R., 369, where the conclusion is finally arrived at that this legislation is tantamount to an act of Congress. If that be a correct view, an express enumeration of certain specific powers similar to that sought to be upheld here would certainly preclude the authority of the legislature of the Territory to confer others not enumerated.

If the order of the probate judge is void, as we contend,

the attachment, if otherwise regular, would be a nullity and form no basis for constructive service.

Philpot *vs.* Neuman, 11 Neb., 301; 9 N. W. R., 94.
Drake on Attachments, sec. 33.
Shinn on Attachments, 351.
Powell *vs.* Muskegon, 50 N. W. R., 308.

Under the terms of the statute itself the failure of the attachment defeats the action and compels its dismissal, and even if, as counsel contend, the appearance of the defendant in error had been general the points, which are involved would be equally fatal to the case, whether the appearance was general or special. The attachment having failed, nothing could result under the statute but a dismissal of the case.

But there was no general appearance, nor was the proceeding contested upon any ground except jurisdictional ones.

Counsel are entirely mistaken in their view that a motion to dismiss the case for want of jurisdiction, under a special appearance, on account of defective attachment proceedings, could possibly be construed to be a general appearance. The defendant, The Campbell Commission Company, was a nonresident and no personal service was had upon it, and resting at the very foundation of jurisdiction in the case was the requirement that the court by valid process obtain jurisdiction of its property by a valid actual seizure. See Pennoyer *vs.* Neff, 95 U. S., 716; Rorer on Interstate Law, 124 and 125; Brown on Jurisdiction, section 71, in which the author says:

"A creditor by the seizure becomes a lienholder when the attachment is laid on such property as is liable to seizure, and the lien is created hypothetically dependent upon the confirmation of the attachment, if not set aside *pendente lite*, for because if set aside without the appearance of the defendant, the jurisdiction is gone."

The whole motion of the defendant in error went to the one single proposition, and nothing else, that by reason of various defects in the initial proceedings the court had failed to secure, by a valid process, any jurisdiction or proper control over the *res* in the action, and that the subsequently substituted service by publication was a nullity.

Two steps are essential for the court to acquire jurisdiction: The one is the valid seizure of the property of the defendant; the other is substituted service upon the defendant. The plaintiff did not rest upon its attachment solely, but secured a garnishment process against the same property in the hands of Mr. Pierce, who answered as garnishee, and denied that the defendant, The Campbell Commission Company, had any interest therein. Now, the ground stated in the motion, which the plaintiff in error insists was a general appearance, was a mere reference to the fact that no issue had ever been taken on the answer of the garnishee, and that it was conclusive of the fact that none of defendant's property had been seized; consequently there must be a failure of jurisdiction (*Cooper vs. Reynolds*, 10 Wallace, 308).

The authority cited by counsel to the effect that the appearance of the defendant in error in the case was a general appearance has no bearing whatever on the case, for in order to constitute a general appearance the defendant must file some plea which in effect admits the jurisdiction of the court. That is not true here. Every line and every syllable of the motion denied jurisdiction of the court and went to questions affecting either the power of the court over the *res* or over the person of the defendant in error. We conceive that the true rule is that when a plea is filed by the defendant in an attachment suit, which goes to the truth of and joins issue upon the facts stated in the affidavit for attachment, or which denies the debt or denies the plaintiff's cause of action, then there is a general appearance, no matter what the plea may be called

but if the plea goes to the legality of the service or the legal regularity of the attachment process, either to the affidavit, order awarding the same, or the mode of service of the same, it is not a general appearance, but special. This view is fully upheld by the following authorities:

Belknap *vs.* Charlton, 34 Pac. Rep., 758.
Greenwell *vs.* Greenwell, 26 Kan., 530.
Bury *vs.* Conklin, 23 Kan., 460.
Wood *vs.* Young, 38 Iowa, 102.
Duncan *vs.* Wickliffe, 4 Metc. (Ky.), 118.
1 Drake Attachm., sec. 112.
Glidden *vs.* Packard, 28 Cal., 649.
Johnson *vs.* Buell, 26 Ill., 66.
Bonner *vs.* Brown, 10 La. Ann., 334.
Johnson *vs.* Buell, 26 Ill., 67.
Coffman *vs.* Brandhoffer, 50 N. W. Rep., 6.
Cleghorn *vs.* Waterman, 16 Neb., 226; 20 N. W. Rep., 636, 877.
Petty *vs.* Frick Co. (Virginia) 10 S. E. Rep., 886.
Wynn *vs.* Wyatt's Adm's, 11 Leigh, 534.
Harkness *vs.* Hyde, 98 U. S., 476.
Encycl. Pleading and Practice, vol. 2, 610.

VII.

The law exempting the plaintiff from giving an attachment bond in the present case is invalid under the fourteenth amendment to the Constitution.

It is our contention that a statute which requires a bond to be given when a resident is sued in court upon an attachment proceeding upon the ground of fraudulent disposition of property and dispenses with the same bond when a resident of a foreign State is sued under the same circumstances is invalid under the fourteenth amendment to the Constitu-

tion and under title 24 of the Revised Statutes of the United States, in so far as it attempts to excuse the giving of a bond where the suit is brought against a non-resident, and requires it where the same kind of a suit is brought against a resident.

The first and fifth paragraphs of the fourteenth amendment read as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

* * * * * * *

"*Fifth.* That the Congress shall have power to enforce by appropriate legislative provisions this article."

By section 1977 of the Revised Statutes of the United States it is provided:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

We raise no question of the authority of the legislature of a Territory to dispense with an attachment bond where an action is brought upon a matured obligation against a non-resident where the fact of non-residence under the statute gives the right to attach his property as a necessary preliminary to enforcing his liability thereon in its courts.

In this respect we concede that non residents of the State

are a different class judicially from residents; the fact of non-residence is what gives the remedy as the basis of acquiring jurisdiction in the *quasi* proceedings *in rem*, but when the attachment is given against the non-resident upon the ground that he is fraudulently disposing of his property the distinction that exists between residents and non-residents disappears, and there is no room for treating non-residents by reason of the dissimilar conditions surrounding them as a different class requiring independent legislation. Under this constitutional provision and under the statute enacted in pursuance thereof, above quoted, we conceive the rule to be concurrent with the general rule obtaining with reference to general and special legislation—that is, different provisions and discriminations may be made in the law against non-residents when they fall *sui generis*, but when they are not capable of separate identification from residents by any facts or circumstances other than the fact that they are non-residents—that is, when the fact of non-residence is their only distinguishing feature—the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification; and when the good faith of a non-resident is assailed in his dealings with his property as respects his creditors by attachment proceedings it is impossible to conceive why he should not be entitled as much to the security afforded by a bond in attachment proceedings as in the same proceedings against a resident of the State. We contend that any valid distinction for treating non-residents as a separate class from residents with respect to the law in this particular entirely disappears, and that there is no distinction in fact between the status of the resident and the non-resident when his integrity is assailed by the seizure of his property as the alleged result of fraudulent transactions against his creditors.

Nor it matters not in the present case that the defendant is a foreign corporation, as it is entitled to the full benefit of

both the constitutional amendment and the statute enacted in pursuance thereof.

Santa Clara Co. vs. Southern Pac. R. R. Co., 113 U. S., 394.

It would be hard to conceive, under the terms of section 1977, how the legislature could make a bond the requisite to an attachment on the ground of fraud against a resident and dispense with it in the case of a non-resident without violating that provision of this section which requires that all persons shall have the equal benefit of all laws not only of the United States, but of the State and territorial laws, and of all proceedings for the security of person and property as is accorded by the State to its own citizens.

And indeed it is hard to conceive how the very language of the amendment to the Constitution itself, which provides that no State shall deny any person within its jurisdiction the equal protection of the laws. This constitutional amendment refers not only to persons but to the property, and it certainly means, if it means anything, that that property cannot be taken from it by any sort of process not equally applicable upon the same terms and conditions and upon the same restrictions as against citizens of the Territory, and we believe that the authorities construing this amendment and this statute so clearly recognize this truth in kindred cases that there is no avoiding extending the principle by a parity of reasoning to the case at bar.

See Virginia *vs.* Rives, 100 U. S., 318.
Livestock Ass'n *vs.* Crescent City Co., 1 Abb. U. S., 388.
15 Fed. Cases, 649, No. 8408.
Strouder *vs.* West Va., 100 U. S., 303.
Baker *vs.* State, 54 Wis., 371.
Slaughterhouse cases, 161 Wallace, 106.
In re Jacobs, 98 N. Y., 107.
Eastman *vs.* State, 109 Ind., 279.
State *vs.* Goodwill, 10 S. E., 285.

McCullough *vs.* Brown, 19 S. E., 469.
Bush *vs.* Ky., 107 U. S., 110.
In re Ah Chong, 2 Fed. Rep., 733.
Neill *vs.* Del., 103 U. S., 370.
Baker *vs.* Portland, 8 Oregon, 356.
Claybrook *vs.* Owensborough, 16 Fed., 297; 23 *id.*, 634.
People *vs.* Gallagher, 93 U. S., 438.
U. S. *vs.* Buntin, 10 Fed., 730.
Pace *vs.* Ala., 106 U. S., 583.
San Mateo Co. *vs.* So. Pac. R. R. Co., 13 Fed., 722.
Boyd *vs.* U. S., 116 U. S., 616.

In all these cases above cited, restrictions and discriminations of a less obnoxious character to the real intent and purport of this constitutional provision have been declared unconstitutional, and when all summed up they come down to the first test: Is there any true basis which the judiciary will recognize as a substantial classification for State legislation affecting non-residence? We contend that in the case at bar there is none. We think the legislature of the Territory had no right or authority under the constitution and civil rights bill to pass a law which would require a bond in attachment based on the ground of a fraudulent transfer of property in the case of residents, and dispense with the bond under precisely the same conditions, except that the defendant is a non-resident.

We therefore respectfully submit that the reason given by the court below for its decision was sound, and that if other reasons are necessary they can easily be found in the additional grounds we have submitted in this brief, and that the ruling of the court below was right.

Respectfully submitted.

JOHN W. SHARTEL,
Attorney for Defendant in Error and Appellee.

Statutes of Oklahoma, 1890.

(Page 367.)

AN ACT extending the jurisdiction of the probate court in civil and criminal cases and prescribing the procedure therein and providing for appeals therefrom.

(Took effect December 25, 1890.)

Be it enacted by the Legislative Assembly of the Territory of Oklahoma:

SEC. 1. Probate courts in their respective counties shall, in addition to the powers conferred upon them by the probate chapter of the Territory, have and exercise the ordinary powers and jurisdiction of the justices of the peace and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars exclusive of costs and in action of replevin where the appraised value of the property does not exceed that sum and the provisions of the chapter on civil procedure relative to the justices of the peace and to practice and proceedings in the district courts shall apply to the proceedings in all civil actions prosecuted before said probate courts. *Provided*, that the probate courts shall not have jurisdiction:

First. In any action for malicious prosecution.

Second. In any action against officers for misconduct in office except where like proceedings can be had before a justice of the peace.

Third. In any action for slander and libel.

Fourth. In actions upon contract for sale of real estate.

Fifth. In any matter wherein the title of boundaries of land may be in dispute nor to order or decree the sale or partition of real estate.

SEC. 2. In all cases commenced in said probate courts wherein the sum exceeds the jurisdiction of the justices of the peace, the pleadings and practice and proceedings in said courts, both before and after judgment, shall be governed by the chapter on civil procedure of the Territory governing pleadings and practice and proceedings in the district courts. In all cases commenced in said probate courts that are within the jurisdiction of the justices of the peace, the pleadings and practice and proceedings, both before and after judgment, provided for in the justices' procedure of the

Territory, shall be applicable to the pleadings and practice and proceedings of the said probate courts.

SEC. 3. The probate judge shall on the first day of each term prepare a calendar of the cases standing for trial at said term, placing the cases on said calendar in the order in which the same are numbered on the docket and setting the cases for trial in such order upon convenient days during said term; and the provisions of the chapter on civil procedure of the Territory relative to the docket in district courts shall so far as they are applicable apply to said calendar.

SEC. 4. The probate courts of the Territory shall be deemed to be always open for the filing of papers and the issuance of processes in civil actions and for the purposes of taking and entering judgments by confession for the purpose of trying all actions commenced therein that are triable in the justices' procedure of the Territory and for all probate business of their respective counties.

SEC. 5. Appeals from the final judgment of said probate courts shall be allowed and taken to the supreme court of this Territory in the same manner as (from) the district court and with like effect when only questions of law are involved in the appeal. If questions of fact are to be retried in the appellate court the appeal shall be taken to the district court of the county in manner and form as appeals are taken from judgments of justices of the peace.

SEC. 6. In all cases pending or to be brought in the probate court the probate judge shall have power and jurisdiction to allow injunctions, mandates, writs of prohibition and to make all other and further orders as may be necessary in cases pending in said court and to hear and determine motions made to vacate or modify same and generally to do as to actions pending in said courts any and all acts which the judges of the justices' courts are by law allowed to do. He may also in case of the absence of the district judge from his county allow injunctions in matters about to be brought or pending in the district court, but he shall not have power to vacate or modify same. He shall have power to allow writs of *habeas corpus* in all cases provided by law and to hear and determine the same.

* * * * * * *

This act shall be in force and take effect from and after its adoption and legalization by act of Congress.

Syllabus.

CENTRAL LOAN & TRUST COMPANY *v.* CAMPBELL COMMISSION COMPANY.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 145. Argued and submitted January 17, 1899. — Decided February 20, 1899.

The plaintiff in error, a Texas corporation, commenced an action, in a court of Oklahoma, against the defendant in error, a Missouri corporation, and caused a writ of attachment to be issued and levied upon five thousand head of cattle, claimed to be the property of the Missouri corporation. After such levy, service was made upon one Pierce as garnishee of the Missouri corporation. Pierce answered, denying that he was indebted to or held property of that company, and further set up an agreement under the provisions of which he had shipped to the pastures of that company a large number of cattle, the ownership to remain in him until full payment for the cattle. The cattle levied upon were of this number. He also set up a notice from one Stoddard of an assignment to him of the contract by the Missouri company. He further set up that he was entitled to the possession of the cattle, and asked that they should be returned to him with damages. With the consent of both sides Pierce was appointed receiver of the cattle, and then service was made upon the Missouri corporation by publication, had in compliance with requirements of law. Stoddard then filed an interplea, setting up rights of other parties. This was demurred to, but no action was had on the demurrer. The receiver sold the cattle, paid himself in full and reported to the court that he had a balance in his hands, subject to its order. Then the Missouri company filed pleas to the jurisdiction of the court, and other pleas were filed, setting up claims to the balance in the receiver's hands. The Missouri company also set up that Pierce, by becoming receiver, had abandoned his claim to the ownership of the cattle. The trial court held that the territorial act, authorizing the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge, was unconstitutional and void, and ordered the action dismissed. The Supreme Court of the Territory held that the court below was wrong in this respect, but affirmed its judgment on the ground that an actual levy was necessary in order to give the court jurisdiction, and there had been none. The case being brought here, the Missouri corporation set up that this court was without jurisdiction, because the intervenors in the trial court had not been made parties to the appeal. *Held:*

(1) That it was not necessary to make the intervenors parties;

(2) That property of the Missouri company had been levied on under

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the writ of attachment, and that the decision of the Supreme Court of the Territory to the contrary was wrong;

(3) That the Oklahoma statute, requiring an affidavit in its support, as a prerequisite to the issuance of a writ of attachment, does not involve the discharge of a judicial function, but is the performance of a ministerial duty;

(4) That the court acquired jurisdiction of the defendant corporation by constructive service, by foreign attachment, without its consent;

(5) That the territorial statute, authorizing the issue of a writ of attachment against the property of a non-resident defendant, is not repugnant to the Fourteenth Amendment to the Constitution.

THIS action was commenced on July 2, 1895, in the district court of Noble County, Oklahoma, by the Central Loan and Trust Company, a Texas corporation, against the Campbell Commission Company, a Missouri corporation, to recover upon certain promissory notes not then due. Upon affidavit a writ of attachment issued, and was levied upon five thousand head of cattle, as the property of the Campbell Company. After such levy, a summons in garnishment was served upon one A. H. Pierce, who answered that he was not indebted to and held no property owned by or in which the Campbell Company had an interest. As "a further and special answer" Pierce set out a written agreement entered into between himself and the Campbell Company for the sale and shipment by him, to that company, of a specified number of cattle. This agreement provided that Pierce was to deliver at Pierce Station, Texas, a designated number of cattle, which the company agreed to ship to its pastures in the Indian Territory "at its own risk and pay all freight and other expenses," the expenses to embrace the wages of a man to be put by Pierce with the cattle, "to represent his interest in said cattle." It was recited in the contract that five thousand dollars had been paid at the signing of the agreement "as part of the purchase price;" and the company further agreed to pay to Pierce interest at the rate of ten per cent per annum on all unpaid amounts from the date of shipment of the cattle until full and final payment in accordance with the contract. The company also agreed to ship the cattle to market during the summer or fall of 1895,

for account of Pierce, and to apply the proceeds of sale to payment for the cattle until fully paid for at the rate of fifteen dollars per head; and it was also stipulated that title and ownership of the cattle should be and remain in Pierce until such payment.

In said "further and special answer" it was also alleged that the cattle, upon which the writ of attachment had been levied, formed part of the number covered by the contract above referred to, and had been shipped by Pierce to the pastures of the Campbell Company, but that they had never ceased to continue in the possession of Pierce; it being further claimed that the cattle were subject to a charge for unpaid purchase money, expenses for their care and keeping, etc. The answer further stated that notice had been received by Pierce from one T. A. Stoddard, trustee, that an assignment had been made of said contract to him by the Campbell Company, and a copy of the alleged assignment was annexed. It purported to "sell and assign all the title and interest in and to" the contract between Pierce and the Campbell Company, any profit which might be derived by Stoddard from carrying the contract into final execution, to be applied by him as trustee to the payment, *pro rata*, of certain described notes. The garnishee also declared that on July 12, 1895, receivers had been appointed of the assets of the Campbell Company, and the answer concluded with asking that Pierce might be discharged as garnishee.

With the answer to the garnishment there was also filed by Pierce what was termed an interplea. It was therein, in substance, averred that the cattle which had been levied upon were wrongfully detained from Pierce; that he was entitled to their immediate possession; and he prayed that on the hearing of the interplea judgment might be awarded for the return of the cattle, with damages for their alleged wrongful seizure and detention. A motion was also filed, on behalf of Pierce, "as garnishee and interpleader," to discharge the attachment, substantially on the ground that the cattle belonged to Pierce, and that the latter was not indebted to the Campbell Company, and held none of its property.

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On the date when this motion came on for hearing the plaintiff filed an application for the appointment of Pierce as receiver, "to take charge of the property attached in this action and sell the same in accordance with a certain written contract" attached as an exhibit, being the contract referred to in the answer of Pierce to the garnishment. The service of the writ of attachment was averred, and it was stated that the cattle which had been levied upon had been "under the care, custody and control of the sheriff of Noble County since the third day of July, 1895, when said attachment was levied;" and it was further averred: "That said A. H. Pierce claims no interest in said property or this suit except as set forth in said contract hereto attached, and is entirely friendly to all parties concerned in said action, and, as plaintiff and its attorneys are informed and believe, the appointment of said A. H. Pierce as receiver herein would be entirely satisfactory to the defendant and all other parties in said action."

The pecuniary responsibility of Pierce and his large experience as a dealer and raiser and shipper of cattle, and other circumstances, were set forth as warranting his appointment without bond to sell the cattle in the usual commercial way, instead of at public sale, and the application concluded as follows:

"That it would be to the interest of all parties concerned to have A. H. Pierce appointed receiver to take charge of said steers and sell the same to the best advantage, accounting to the court for all sales, and, after satisfying his claim under said contract, hold the money remaining in his hands subject to the final order of this court.

"That said A. H. Pierce has already shipped from five thousand head of steers so seized in attachment about three hundred and sixty head and sold the same in market, and now holds the proceeds thereof, which should be accounted for by said A. H. Pierce along with other accounts of shipments."

An order appointing the receiver was thereupon made, the consent of the attorneys both of Pierce and the plaintiff being noted thereon, and Pierce qualified as receiver.

A summons which had been issued having been returned

"defendant not found," publication was had in compliance with the legal requirements.

Subsequently Stoddard, trustee, filed an interplea. Therein it was averred that the contract between Pierce and the Campbell Company had been made by that company for account of a firm styled George W. Miller & Son, and had been entered into in the name of the Campbell Company in order to secure that company for advances which had been made by it to Miller & Son; that under an assignment by the Campbell Company to Stoddard he was entitled to the proceeds of the sale of the cattle in the hands of the receiver after the claim of Pierce had been paid. Plaintiff demurred to this interplea on November 5, 1895, but no action was ever had thereon.

A report was filed by the receiver, showing that he had sold the cattle, and from the proceeds had satisfied in full his claim under the contract of September, 1894, and that a balance was in his hands subject to the order of the court. Thereafter the Campbell Company filed a "plea to the jurisdiction," and subsequently filed an amended plea, which stated seven grounds why the court was without jurisdiction, all of which will be hereafter referred to.

After this George W. Miller and J. C. Miller filed an interplea in the action, claiming that they were the real contractors with Pierce in the agreement of September 8, 1894, and averred their ownership of the cattle, and that if the contract had been assigned to Stoddard, it was done without their authority, and was void. It was prayed that the proceeds of the cattle be paid to them after the payment to Pierce of the amount of his claim. No issue was taken on this interplea.

On the same date that the Miller interplea was filed the plaintiff filed an answer to the interplea of A. H. Pierce, averring among other things that Pierce, as a result of the receivership proceedings, had waived and abandoned all his claim in and to the ownership of the cattle levied on under the attachment. On December 16, 1895, the plea of the Campbell Company to the jurisdiction was heard, upon the

record, over objection and exception by plaintiff. The court overruled all the grounds assigned in the plea except the second, which asserted that there was a want of power in the probate judge to issue an order for attachment. As to such ground it held that the act of the territorial assembly of Oklahoma, conferring power upon the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge from the county, was unconstitutional and void. It thereupon concluded that all the proceedings were void, the attachment was quashed, and the suit dismissed for want of jurisdiction, without prejudice to the Campbell Company. The Campbell Company excepted to the action of the court in overruling all the grounds of its plea to the jurisdiction but that referring to the power of the probate judge, and the plaintiff excepted to the action of the court holding that there was a want of power in the probate judge.

Error was prosecuted to the Supreme Court of the Territory. That court, whilst concluding that the lower court was wrong in deciding that the probate judge was without authority to allow the attachment, yet affirmed the judgment below on the ground that as an actual levy on the property of the defendant Campbell Company was necessary to give the lower court jurisdiction to determine the cause, and as there had been in law no such levy, therefore the court below was without jurisdiction, and had correctly dismissed the suit. The reasoning of the court, in effect, sustained the third ground of the motion to quash the attachment made by the Campbell Company. A petition for rehearing having been overruled, the cause was brought to this court.

Mr. William D. Williams, for plaintiff in error and appellant, submitted on his brief.

Mr. John W. Shartel for defendant in error and appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that as the intervenors in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. But the intervenors did not except to the action of the trial court in vacating the attachment and dismissing the action. They were not made parties to the proceedings in error prosecuted from the judgment of the trial court to the Supreme Court of the Territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising on the record could not be decided in the absence of the intervenors, and the Supreme Court of the Territory manifestly assumed that the intervenors were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. If their absence was treated by the parties to the proceedings in the Supreme Court of the Territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such intervenors is necessary on this appeal, which has solely for its object a review of the judgment rendered by the Supreme Court of the Territory. Considering the facts just stated, and the further fact that it is obvious that the rights of the intervenors cannot be prejudiced by a review of the action of the Supreme Court of the Territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled.

The third ground stated in the plea of the defendant, the Campbell Company, to the jurisdiction of the court, was the one which the Supreme Court of the Territory found to be well taken, and upon which it based its affirmance of the judgment quashing the attachment and dismissing the action for want of jurisdiction. The reasoning by which the court reached its conclusion was in substance as follows:

The garnishee Pierce answered that he had nothing subject to garnishment. After doing this, he further answered, setting out an alleged contract between himself and the de-

fendant, by which he had agreed to sell and ship to the pastures of the defendant a certain number of cattle, which agreement had been carried into execution, the cattle seized under the attachment being a portion of those shipped in carrying out the contract. The answer then stated that although the cattle had been thus shipped, by the terms of the contract, the right to their possession remained in the garnishee Pierce, to whom there was a large amount due under the contract for purchase money and expenses. The answer further stated that the garnishee had been notified of an assignment by the defendant of its rights under the contract, the date of this assignment as given being prior in time to the levy of the attachment. Considering that there had been no traverse by the plaintiff to the answer of the garnishee, within twenty days, as required by the Oklahoma statute, the court concluded that all the facts and averments and the inferences deducible therefrom, stated in the answer, were to be taken as true, not only as between the garnishee and the plaintiff, but also between the plaintiff and the defendant, in determining whether property of the defendant had been levied upon, under the attachment. Upon this assumption, finding that the answer of the garnishee established that no property of the defendant had been levied upon under the attachment, it thereupon dissolved the attachment and dismissed the suit. But this reasoning was fallacious, since it assumed that because the failure to traverse the answer of the garnishee was conclusive of his non-liability, in the garnishment proceedings, it was therefore equally so, as between the plaintiff and defendant, in determining whether the property which had been levied upon under the attachment belonged to the defendant. But the two considerations, the liability of the garnishee under the proceedings in garnishment and the validity of the levy previously made under the attachment, were distinct and different issues. The section of the Oklahoma statute to which the court referred (Oklahoma Stat. 1893, sec. 4085) provides that the answer of the garnishee "shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice

in writing that he elects to take issue on his answer." It, however, can in reason be construed only as importing that the facts stated in the answer, unless traversed, should be conclusive, for the purpose of determining whether the garnishee was liable under the process issued against him and to which process his answer was directed.

Indeed, all the facts stated in the "further" answer of the garnishee were, in legal effect, substantially irrelevant to the issue between the plaintiff and the garnishee, since they referred not to the garnishee's liability to the defendant, but propounded a distinct and independent claim which the garnishee asserted existed in his favor as against the defendant, as a basis on his part for claiming property which was already in the possession of the court under the attachment, and held as the property of the defendant in attachment. This was the view taken by the garnishee of his rights on the subject, for the answer in the garnishment concluded simply by asking that the garnishee be discharged from the proceedings. And on the same day he intervened in the main action and filed his interplea asserting in his behalf a right of possession to the cattle seized and demanding damages for their detention. The judgment below, then, not alone caused the failure to traverse the answer to conclude the plaintiff as to the issues which could legally arise on the garnishment, that is, the liability of the garnishee thereunder, but it also made the failure to traverse operate as a summary and conclusive finding in favor of the garnishee on his interplea in the action, which was a wholly independent and distinct proceeding from the garnishment itself. The reasoning necessarily went further than this, since by relation it caused the answer of the garnishee to become conclusive between the plaintiff and the defendant, thereby setting aside the seizure made before the garnishment issued, falsifying and destroying the return of the sheriff that he had levied upon the property of the defendant, and in effect decided the case in favor of the defendant without proof and without a hearing.

Nor can a different conclusion be reached by considering that in the further answer of the garnishee it was stated that

he had been notified of an assignment of the rights of the defendant Campbell Company under the contract, purporting to have been made prior to the levy of the attachment. This was not pertinent to the question of the liability of the garnishee under the garnishment proceedings, and could not operate to conclusively establish as between the plaintiff and the defendant, or as between the plaintiff and the alleged assignee, either the verity or the legal sufficiency of the alleged assignment.

Aside, however, from the foregoing consideration, the record established a condition of facts which relieved the plaintiff from the necessity of traversing the answer of the garnishee, in so far as that answer referred to the independent facts substantiating the intended claim of the garnishee to the right of possession of the property already under seizure, and which, moreover, estopped the garnishee, and, therefore, the defendant, from asserting any right of possession by reason of the facts alleged in the further answer. Before the time for traverse had expired, and at the date when a motion filed by Pierce, as garnishee and interpleader, to discharge the attachment on the ground of his assumed right of possession under the contract, had been noticed for hearing, the court, by the consent of plaintiff and the garnishee, (the only parties who had up to that time appeared in the cause,) appointed the garnishee Pierce receiver, to dispose at private sale of the cattle, which had been levied upon, to pay from the proceeds the claim of Pierce, by virtue of his contract, and to hold the balance subject to the final order of the court. Obviously, this order, and the rights which Pierce took under it were wholly incompatible with the assumption that he was entitled to the possession of the property levied upon as the owner thereof. By the effect of the order, he was to be paid the full purchase price of the cattle. He could not take the price and keep the cattle. The situation was this: At the time the Campbell Company made its motion to dismiss for want of jurisdiction, the garnishee had taken substantial rights which had for their inevitable legal effect to render unnecessary any traverse of so much of his answer as referred to his rights

under the supposed contract, and which also disposed of his interplea and claim of individual right to the possession of the property levied on under the attachment; yet the result of the judgment rendered below was to dismiss the action at the instance of the defendant on the ground of supposed rights vested in the garnishee, when the garnishee himself had disclaimed or had abandoned the assertion of such presumed rights.

As the foregoing reasons dispose of the view of the case taken by the lower court, we confine ourselves to them. Because, however, we do so, we must not be understood as intimating that the defendant had the right to assail the jurisdiction of the court, or question the right of the court to order the giving of notice by publication, on the ground that it was not the owner of the property actually levied upon, and that the affidavit for publication was untrue in stating that the defendant had property within the jurisdiction, when if it were not such owner no prejudice could come to it, as the judgment of the court, from the nature of the proceeding before it, could necessarily only operate upon the property levied on. Nor, moreover, must we be considered as assenting to the construction given by the court to the contract between the Campbell Company and Pierce, the court, in its recital of the facts, stating that under the contract Pierce had a vendor's lien for the amount of the purchase price upon the cattle which had been levied upon, but in the opinion construing the contract as not divesting Pierce of the title to the cattle.

Although the court below based its conclusion only upon one of the grounds taken in the plea of the defendant to the jurisdiction, it nevertheless in the course of its opinion stated that the whole plea was before it, and that all the grounds therein stated were open for its consideration. We, therefore, shall briefly consider such of the remaining grounds stated in the plea to jurisdiction as have been urged in argument upon our attention.

I. It is contended that the attachment proceedings were void and that the court consequently was without jurisdiction,

because the order for attachment was signed by the probate judge, acting in the absence of the district judge, conformably to a power to that effect given by the territorial statute. The claim is that the statute conferring such power upon the probate judge was repugnant to the organic act and void, for the following reason: The organic act authorized the establishment of a Supreme Court and district courts to be vested with "chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property." The grant of common law jurisdiction, it is argued, embraced authority to issue attachments. Being then within the jurisdiction expressly vested in the courts named, it was incompetent for the territorial legislature to delegate to the probate courts, which the organic act authorized to be established, or to a judge of such a court, any jurisdiction in the premises, even although the organic act empowered the legislature to define and limit the jurisdiction to be exercised by probate courts.

A review of this contention is rendered unnecessary, because of the mistaken premise upon which it rests. On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute. The text of the statute is stated in the margin.[1] This statute is a reproduc-

[1] SEC. 4120. Where a debtor has sold, conveyed or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering them or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the same debtor.

tion of a statute of Kansas; and, in 1884, before the organization of the Territory of Oklahoma, the Supreme Court of Kansas, in *Buck* v. *Panabaker*, 32 Kansas, 466, had recognized the power of a probate judge to grant a writ of attachment in cases provided by law, while it had early held, in *Reyburn* v. *Brackett*, 2 Kansas, 227, under a statute containing requirements as to the statements to be made in the affidavit for an attachment like unto those embodied in the statute of Oklahoma now under consideration, that the authority vested in an official to grant the writ imposed a duty simply ministerial in its nature. It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court. *Reyburn* v. *Brackett*, 2 Kansas, 227; *Wheeler* v. *Farmer*, 38 California, 203; *Harrison* v. *King*, 9 Ohio St. 388; Drake on Attachments, 7th ed. p. 92. The cases cited and relied upon by counsel as holding to the contrary do not sustain what is claimed for them. In some of them, *Reyburn* v. *Brackett*, 2 Kansas, 227; *Simon* v. *Stetter*, 25 Ohio St. 388; and *Harrison* v. *King*, 9 Ohio St. 388, the rule we have stated is upheld; in others, *Morrison* v. *Lovejoy*, 6 Minnesota, 183, and *Guerin* v. *Hunt*, 8 Minnesota, 477, 487, the particular statute under consideration was construed as requiring, on the part of the officer allowing the writ, a weighing and determination of the sufficiency of the proof; whilst, again, in others, *Seidentopf* v. *Annabil*, 6 Nebraska, 524, and *Howell* v. *Circuit Judge*, 88 Michigan, 369, the statute expressly required that the writ should be allowed by a judge, and hence the clerk of the court was held incompe-

SEC. 4121. The attachment authorized by the last section may be granted by the court in which the action is brought, or by the judge thereof, or in his absence from the county by the probate judge of the county in which the action is brought; but, before such action shall be brought or such attachment shall be granted the plaintiff, or his agent or attorney, shall make an oath in writing showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds for an attachment enumerated in the preceding section.

tent to issue the writ without the previous authorization of the order by the court.

Nor does section 3 of the act of Congress of December 21, 1893, c. 5, 28 Stat. 20, empowering the Supreme Court of the Territory or its Chief Justice to designate any judge to "try" a particular case in any district where the regular judge is for any reason unable to hold court, constitute an implied prohibition against the conferring by the legislature of authority upon one not a judge of the court in which the main action is pending to perform a ministerial act like that here considered.

II. It is insisted that "under the organic act of the Territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent."

The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem*, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached. It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found.

III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the Territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued,

is a discrimination against a non-resident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a State or Territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents "are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents — that is, when the fact of non-residence is their only distinguishing feature — the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification."

When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the residents of a State or Territory and non-residents, as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attempts to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument in substance is that where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a non-resident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing processes of attachment against a non-resident and not permitting such process against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning then is, that, although the difference between the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is

exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and non-residents, for the purpose of the writ of attachment, and then from this concession, to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction is without merit.

The foregoing considerations dispose not only of the grounds passed upon by the court below, but those pressed upon our attention and which were subject to review in that court; and as from them we conclude there was error in the judgment of the lower court, its judgment must be

Reversed, and the case remanded for further proceedings in conformity to this opinion.